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OF THE

SOCIETY OF COMPARATIVE LEGISLATION.

EDITED FOR THE SOCIETY BY

JOHN MACDONELL, Esq., C.B., LL.D.

AND

EDWARD MANSON, Esq.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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THE RIGHT HON. JAMES BRYCE, M.P.

We present the portrait of one well known to every reader of The Journal of Comparative Legislation. Politics have of late seemed to claim Mr. Bryce for their own. They have, however, filled but a fragment of a singularly varied career. He has cultivated literature and history with signal success; he has been a traveller and explorer; long ago he won a great academic reputation; and more recently he has shown himself a skilful administrator and a powerful and ready debater. To describe concisely and accurately the place in English life of one who has attained a foremost place in the House of Commons, who has been Professor of Civil Law, Under-Secretary of State for Foreign Affairs, Chancellor of the Duchy of Lancaster, President of the Board of Trade, and a Cabinet Minister—who has climbed Mount Ararat and has been President of the Alpine Club—who has written works so diverse as *The Flora of the Island of Arran*, *The Holy Roman Empire*, and *The American Commonwealth*—and who can address with ease a popular assembly in French, German, or Italian—is difficult. If he has found little leisure for the exercise of the legal profession, what he has written—notably his essays on Jurisprudence—make every lawyer his debtor. If Emerson's test of the very greatest works of literature—"And life was larger than before" their appearance—cannot be applied to all the books which have flowed from his prolific pen, two at least of them have become classics; and in the many years which have passed since their publication, their reputation has steadily grown. It is often a sore disappointment to Englishmen talking of their men of letters and lawyers with foreigners to find that names much extolled here are almost unknown beyond our borders. It is not so with Mr. Bryce. He is one of the very small group of Englishmen who are held in high honour by the scholars of France, Germany, and America. He is indeed everywhere known, and not least for his services to the causes which this journal seeks to further.

THE OLDEST CODE OF LAWS.[1]

[*Contributed by* PROFESSOR F. W. MAITLAND.]

The Gift of the Sun-God.—In a little book of less than a hundred pages Mr. Johns, who has rapidly been making a name for himself as an Assyriologist, has published an English version of what he justly describes as one of the most important monuments in the history of the human race. It is the code of laws given by the Sun-God to Hammurabi, a king of Babylonia who lived, so it is believed, in the third millennium before the Christian era. A block of black diorite, nearly eight feet high, is found at Susa by French explorers, and here is in English the sum and substance of what is engraved upon it.

We unfortunates must take Mr. Johns at his word, or if we compare his rendering with the work of Father Scheil or of Dr. Winckler, we are in no position to decide their differences. Only this can we say, that Mr. Johns appears to be wary and modest, and to be fully alive to the immense difficulties which beset a translator of legal documents. Readers of this journal know how hard it is to render into English some parts of the new German Code. We shall square the circle before we find the English words that exactly give the Reichstag's meaning, no more and no less. And yet in this case we are dealing with two kindred languages and with two communities which stand on the same level of civilisation. Hard indeed must it be, nay impossible, to find equivalents for the words of Hammurabi or of the Sun-God.

By-and-by we shall no doubt have commentaries and expositions. At present we have a translation, which we trust the more because it is very bald, and a well-conceived index which is full enough to serve the purpose of an alphabetically arranged digest.

For the outsider, the man utterly ignorant of Assyrian history and of the Assyrian language, it would as yet be very perilous to say anything about the contents of the code. He thinks what nonsense he would make of the Twelve Tables, what untruth he would get out of the Lex Salica and the edict of Rothari, had not generations of scholars laboured

[1] *The Oldest Code of Laws in the World.* Translated by C. H. W. Johns, M.A., Lecturer in Assyriology, Queens' College, Cambridge. (Edinburgh: T & T. Clark, 1903.)

upon those documents and their environment, and exposed each other's ignorance and called each other names. Still, when all due allowance has been made for possible mistakes, there can, so we think, be no doubt at all that the stage of civilisation of which these laws speak to us is marvellously high.

2250 B.C. and 1000 A.D.—This may be "The Oldest Code of Laws in the World"; it is very far from being the most archaic. It may come to us from "the third millennium B.C.," but we find ourselves doubting whether our own English ancestors at the end of the first millennium A.D. were not in many important respects behind the subjects of Hammurabi and the worshippers of the Sun-God.

It is true that we see a great deal more than we like of that "crude retaliation" which our ancestors, most unfortunately for them, saw in the Bible. There is a great deal of eye for eye and tooth for tooth. "If a man has made the tooth of a man that is his equal to fall out, one shall make his tooth fall out": so it is written. We do not remember to have seen this principle carried to the length that it goes in the second of the following sentences, in which the Sun-God deals with the builders, the jerry-builders, of Babylon:—

§ 229.—If a builder has built a house for a man and has not made strong his work, and the house he built has fallen, and he has caused the death of the owner of the house, that builder shall be put to death.

§ 230.—If he has caused the son of the owner of the house to die, one shall put to death the son of that builder.

"Culpa" or Negligence.—On the other hand—and this we take to be a good index of the general level of civilisation—some concept corresponding roughly to the Roman *culpa* or our own "negligence" seems to play a decidedly larger part than is assigned to it in bodies of law which are much younger than Hammurabi's. For example, the borrower of an ox which dies a natural death goes quit. "If the ox has pushed a man, by pushing has made known his vice, and he has not blunted his horn, has not shut up his ox, and that ox has gored a man of gentle birth and caused him to die, he shall pay half a mina of silver. If a gentleman's servant, he shall pay one-third of a mina of silver." You must, as our phrase goes, prove the *scienter* against the owner of the ox: it is entitled to its first push. On the other hand, if a man has a wild bull in his charge and it gores another man, "that case," we are told, "has no remedy." We very much wish for a little explanation at this point; our guess would be that the liability for the bull's act is absolute. A surgeon seems to be an insurer, and an insurer under a heavy penalty. If his operation upon an eye leads to the loss of an eye, you cut off his hands. But surgery is "extra-hazardous" work.

Oath, Ordeal, and Deed.—Formal exculpatory oaths are known. So is the water ordeal in the holy river. The holy river seems to express its

indignation, not by rejecting the culprit, as did the water in our ordeal pits, but by overwhelming him. However, we see a few passages which seem to point to a rational estimate of contradictory evidence given orally by witnesses, and if this can be surely found, then we may say that the Babylonians had made a great and very difficult step along the appointed pathway of jurisprudence. But what strikes us most is the free use of writing for legal purposes. We even are told of a case in which the effect of a father's gift to his daughter is made to turn on the use of a particular clause in a written "deed." Did it or did it not contain the clause "after her wherever is good to her to give"?—a clause apparently which bestows a "general power of appointment." There is some delicate work of this kind in the code, not very easy to understand, but still delicate.

Ihering's Views as to Babylon.—We know how the great Romanist of our own time—one, surely, of the greatest lawyers that ever lived—died with his eyes fixed on Babylon. Rudolph von Ihering desired to see this day, and did not see it. The great problem that he raised is perceptibly nearer its solution than when he left us. Shall we have to think of all jurisprudence, all progressively rational jurisprudence, as a daughter of Babylon? This, and nothing much less than this, is the question that Mr. Johns and his fellow-labourers should keep in view. Meanwhile we salute the Sun-God.

THE GREAT JURISTS OF THE WORLD.

II.—ULPIAN.

[*Contributed by* James Crawford Ledlie, Esq.]

Political Conditions of Ulpian's Age.—The social and political conditions of the age in which Ulpian lived seem ill adapted to the growth and development of a great legal talent. A period of stability and tranquillity, in which the supremacy of the law is secure and the search for truth undistracted by the play of violent, elemental passions, would appear indispensable for the fruitful pursuit of legal as of other kinds of knowledge. Concerned as he is at every point with questions of right and wrong in human conduct, the student of law is not unlikely, when passions run high, to swerve from the strait path of single-minded, unbiassed truth-seeking. It happens often enough, indeed—as our own history shows—that great lawyers rise to eminence in periods of storm and stress, when the reign of the law itself is imperilled. But the truth seems to be that the forces of human character which are evoked on such occasions as these are the forces of political rather than of specifically legal instinct.

The period covered by the last part of the second and the early years of the third century of our era was certainly not a period of tranquillity, though, on the other hand, it cannot be said that the supremacy of the law was seriously in danger. It is true there was a great deal of lawlessness "in high places," and within the sphere of high political intrigue human life was held very cheap, and the claims of justice and morality were frequently and flagrantly ignored. Nevertheless, as far as the great mass of mankind was concerned, the strong legal machinery of the Roman Empire worked, in all probability, smoothly and efficiently. Men bargained and sold, let and hired, managed their property and made their wills, under the full protection of the law, and of a law to the development and shaping of which some of the wisest minds of all ages had contributed, and were, at that very moment, still contributing.

On the other hand, no period ever had less claim to be ranked as tranquil. While Ulpian was growing to manhood (the exact year of his birth is uncertain, but we shall probably not be very wide of the mark if

we assume it to have been about 180 A.D.), Septimius Severus was Emperor of Rome (193–211 A.D.). He had "waded through slaughter to a throne," and for some twenty years he succeeded in maintaining his supremacy by that sinister combination of shrewdness and cruelty which, in such times as his, is apt to take the place of statesmanship. During all these years the law was inflexibly upheld, and justice was wisely and impartially administered. But when Severus died, the chaos which he had foreseen set in. The hatred which had smouldered for some years between his two sons Caracalla and Geta burst into full flame. In the short, fierce struggle which ensued, Caracalla is reported to have caused no less than twenty thousand persons to be put to death on the ground that they were partisans of Geta. Such was the reign of terror that no one (we are told by Dion Cassius) ventured to utter the hated name of Geta in the presence of the Emperor and his friends, and the very estates of those who introduced it into their wills were ordered to be confiscated. Nor did the murder of Geta and the extirpation of his adherents appease the fury of Caracalla. From the capital he turned his mad frenzy against the provinces. "Every province," Gibbon tells us (cap. 6), "was by turns the scene of his rapine and cruelty. The senators, compelled by fear to attend his capricious motions, were obliged to provide daily entertainments at an immense expense, which he abandoned with contempt to his guards. . . . The most wealthy families were ruined by partial fines and confiscations, and the great body of his subjects oppressed by ingenious and aggravated taxes. In the midst of peace, and upon the slightest provocation, he issued his commands at Alexandria in Egypt for a general massacre. From a secure post in the temple of Serapis he viewed and directed the slaughter of many thousand citizens, as well as strangers, without distinguishing either the number or the crime of the sufferers."

Ulpian's Literary Activity.—It was while events such as these were taking place, while "a monster whose life disgraced human nature" was at the head of the Roman Empire, that Ulpian composed the greater part of his legal works. Whether (as Mommsen thinks) the larger portion of his great treatise *Ad Edictum* (in eighty-three books) was written before the reign of Caracalla, or whether the whole of it was written during that reign,[1] it is certain that his literary output during this period was enormous. Besides the treatise *Ad Edictum*, we should probably assign to this reign, not only the elaborate commentary on the *ius civile* (in fifty-one books) known as the *Libri ad Sabinum*,[2] but also a number of monographs

[1] This is the work the excerpts from which in the Digest are stated to be more numerous than the excerpts from all the works of any other single jurist.

[2] The Sabinus referred to is, of course, the famous jurist Masurius Sabinus (the author of the *libri tres iuris civilis*), who lived in the reign of Tiberius. Lampridius, one of those "wretched, untrustworthy writers" (as Puchta calls them) on whom we have to fall back, for want of any better, for much of our information concerning this whole period, confuses him with a friend of Alexander Severus called Sabinus—a characteristic piece of ignorance and slipshodness.

on sundry statutes, treatises on the functions of the different magistrates,[1] two books of Institutes, and other works.[2]

Early Career.—There would be nothing very exceptional in the spectacle of Ulpian's quietly composing lengthy treatises on legal subjects while Rome was (figuratively speaking) burning, if he had been by temperament a student. But such was very far from being the case. Throughout his life he was in close touch with political affairs, either as an actual participator or, at any rate, as a keenly interested and vigilant observer. He appears for the first time in public life at a comparatively early age. In the reign of Septimius Severus he was an assessor in the auditorium of Papinian, and served as a member of the Imperial Council. There are some stories afloat as to the existence of a certain rivalry between him and Papinian, and, according to Rudorff (*Rechtsgeschichte*, I. p. 189), he was even implicated in the fall of his great predecessor. But the evidence for all such allegations is extremely untrustworthy. Under Caracalla he held the post of *scriniorum magister* (Master of the Records), Paul being at the same time *ad libellos* (Master of Petitions).

Heliogabalus: Ulpian's Tyrian Extraction.—Under Heliogabalus, the High Priest of the Syrian Sun-God, who succeeded Caracalla after the brief but sanguinary interlude of Macrinus' reign, Ulpian appears to have suffered a check in his career. He was deprived of all his dignities,[3] banished from Rome, and even threatened with execution. During the five years of Oriental effeminacy and despotism which marked the Syrian's reign (218–222 A.D.), Ulpian appears to have devoted himself, in the main, to

[1] One of these, *De officio Proconsulis libri X.*—which was a treatise on the criminal law—dealt, amongst other things, with the penal laws then in force against the Christians. It is extremely unlikely that Ulpian, whose only business was to present a complete account of the existing criminal law, expressed either approval or disapproval of the penal statutes in question. Most probably he "cared for none of those things," apart from their legal aspect. Nevertheless, he came to be regarded in the Middle Ages as a vehement enemy of the Christians. The charge probably originated in a passage in the *Institutiones Divinæ* of Lactantius (V. 11): "Domitius de officio Proconsulis libris VII. (*sic*) rescripta principum nefaria collegit, ut doceret quibus pœnis affici oporteret eos qui se cultores Dei confiterentur;" and elsewhere Lactantius speaks of the "constitutiones sacrilegæ et disputationes iurisperitorum iniustæ" directed "contra pios." To which statements an old commentator adds the quaint remark that he had hitherto borne a certain grudge against Justinian for abolishing the writings of the old jurists with a view to compiling his *Pandects*; "nunc vero præterea etiam hominem laudo qui incestas illas et, ut (Lactantius) noster vocat, sacrilegas (constitutiones) sustulit."

[2] A complete list of Ulpian's works will be found in Rudorff's *Römische Rechtsgeschichte*, vol. i. pp. 190, 191. See also Dr. Roby's *Introduction to the Study of Justinian's Digest*, pp. 199, 200. There is much uncertainty as to the dates when many of his books (*e.g.*, the two books of *Responsa*, the *Liber singularis Regularum*) were composed. Much of his work was done in the reign of Heliogabalus. The treatise *De adulteriis* was certainly written after Caracalla's reign.

[3] According to some accounts these dignities included the highest post of all, that of *Præfectus Prætorio*, with which Heliogabalus had invested him. According to other accounts he did not become *Præfectus Prætorio* till the reign of Alexander Severus.

literary work, though he doubtless kept a watchful eye on public affairs. There were indeed good reasons why Ulpian should feel a kind of special, personal interest in the politics of the Court at that time. Heliogabalus (whose mother, Soæmias, was a first cousin of Caracalla and Geta, and a sister of Julia Mamæa, the mother of the future Emperor Alexander Severus) was the first Roman emperor of Asiatic extraction. Now Ulpian —as he tells us himself in a passage which has been preserved to us in the Digest [1]—was of Tyrian origin. Strong as was the solidarity of the Roman Empire, and powerful as were the tendencies of the time towards an elimination of the smaller local patriotisms in favour of a wider Imperial unity, nevertheless it is clear that Ulpian retained throughout his life a keen personal interest in Tyre and things Syrian.[2] The accession of the priest of Emesa as the first emperor of Asiatic extraction—Emesa was, like Tyre and Berytus, an important Syrian town—naturally, therefore, added a stimulus to Ulpian's interest in public affairs, and inspired him with the hope of rising to a still higher eminence than any to which he had previously attained.[3] Julia Mamæa, a clever and ambitious woman, had probably foreseen that the eccentric rule of Heliogabalus would inevitably be short-lived, and had been quietly preparing the way for the proclamation of her son Alexander as Emperor. Ulpian appears to have gained the full confidence of Mamæa, and may have assisted her with advice in carrying

[1] 50, 15, 1 *pr.* "Sciendum est esse quasdam colonias iuris Italici, ut est in Syria Phœnice splendidissima Tyriorum colonia, unde mihi origo est, nobilis regionibus, serie seculorum antiquissima, armipotens, fœderis quod cum Romanis percussit tenacissima." The words "unde mihi origo est" seem to indicate that Tyre was not his actual birth-place. Bremer (*Rechtslehrer u. Rechtsschulen im römischen Kaiserreich*, p. 87) suggests that he may, at any rate, have resided at Tyre for some time, and may have been, temporarily, professor at the University of Berytus.—It is remarkable how prominently Syria and Syrians figure in this period of Roman history. It is quite possible that Papinian was a Syrian (see Professor Clark's article in this journal, N.S., IX. p. 19). Julia Domna, the wife of Severus, was a Syrian. Ulpian, the Emperor Heliogabalus, and Julia Mamæa (see the text above) were all Syrians. The Emperor Macrinus held a Court at Antioch, and a battle fought in Syria put an end to his short reign.

[2] Thus in the passage already quoted from the Digest in the last note, there is a pleasant ring of pride in the antiquity and natural beauty of Tyre, though at the same time its obligations as a city of no mean Empire are emphasised. In other passages Ulpian mentions Syria, and Asia, and the Punic language. Thus in D. 32, 11 *pr.*, after stating that *fideicommissa* could be expressed in any language, he adds, "non solum Latina vel Græca, *sed etiam Punica* vel Gallicana vel alterius cuiuscumque gentis." Again in D. 45, 1, 1, 6, after stating the rule that a *stipulatio* is valid, if the question is put in Latin and the answer given in Greek, or *vice versa*, "dummodo congruenter respondeatur," he proceeds to ask whether this rule is limited to Greek, or whether it is equally applicable to other languages, "Pœnum forte vel Assyrium vel cuius alterius linguæ," and he decides that any language will serve, "ita tamen ut uterque alterius linguam intelligat"—a characteristic piece of minute comment on a matter of growing practical importance.

[3] It is assumed here that Ulpian did not become *Præfectus Prætorio* till the reign of Alexander. But see p. 15, note [3], above.

her designs into execution. About the year 222 A.D., at any rate, he held the post of *Præfectus Annonæ* (Commissioner of Corn Supply), and no sooner had the dagger put an end to the tragi-comedy of the Sun-Priest's rule, than we find Ulpian forthwith installed as the guide, philosopher, and friend of the sixteen-year-old Emperor.

Friendship of Alexander Severus.—For the rest of his life Ulpian retained the complete confidence of his Imperial master and (what was perhaps more important) his Imperial mistress. In one place Alexander speaks of him as "amicus meus," in another as "parens meus," and several passages in the historians bear testimony to the close personal relationship which existed between Emperor and jurist.[1] Ulpian was now, and remained for some six years, the virtual Regent of the Empire, "a partner" (to use the words of Zosimus) "in the Imperial power." His actual position is variously described. According to some reports the office of *Præfectus Prætorio*[2] was, so to speak, held in commission by Ulpian and two other persons, Flavianus and Chrestus, though it would seem that the latter were soon removed, Ulpian thus becoming sole *Præfect.* According to another account, Ulpian was President of a Council of sixteen Senators especially selected by the Emperor to discuss public matters of moment and to advise the Emperor thereon. Anyhow, his duties were of a most exacting character, and he found no leisure for literary activity. Alexander's attention to the judicial duties of the Emperor is stated to have been most assiduous, and it is probable that Ulpian bore the largest share in lightening the heavy burden of work which devolved on the Emperor as the supreme fountain of justice throughout the Empire. We are told that Alexander devoted the greater part of the mornings and a large part of the afternoons to the consideration of letters and petitions; and in exercising that "patience and discretion above his years" which, as Gibbon says, he showed in the determination of private causes, he was presumably largely guided by the wide knowledge, ripe experience, and shrewd wisdom of Ulpian.[3]

Military Opposition to Ulpian: his Death.—But the difficulties of Ulpian were not merely those of a very hard-worked official. Strong as he was in the favour of the Emperor and his mother, his position was far from secure. His promotion excited a considerable amount of jealousy which gradually developed into open hostility and ultimately led to his destruction. It is

[1] Thus we are told that Ulpian was one of the only two people whom Alexander would see alone, and was a constant guest at the Emperor's table.

[2] The *Præfectus Prætorio*, who was originally merely the Captain of the Guards, had gradually become the first officer of the State, the direct representative of the Emperor not only in military, but also in legal and financial matters.

[3] "Wise" is the favourite adjective applied by Gibbon to Ulpian. In Novel 97, 6, Justinian calls him τὸν σοφώτατον; in Cod. 6, 51, 9, he is referred to as "summi ingenii vir," and elsewhere (by Diocletian, Cod. 9, 41, 11), as "vir prudentissimus." Such adjectives are bandied about pretty freely in connection with the great jurists, but they are certainly appropriate in the case of Ulpian.

not easy at the present day to determine the exact nature of the dispute between Ulpian and his foes. His steady opposition to the increasing influence of the military caste is probably rightly assigned as the main cause of the quarrel, though it is not unlikely that a certain amount of his unpopularity was due to personal reasons. Ulpian was not only a clever lawyer, but also an adroit courtier, and we are perhaps not doing him any injustice if we assume that he was no more averse to intrigue than most of the Court officials of the time. By temperament he was probably out of sympathy with the military class, and indeed the influence and unbridled licence of the prætorian guards must have been well-nigh intolerable to any one to whom the supremacy of the law and orderly administration were matters of prime concern. The Emperor himself was, in a large measure, at the mercy of his soldiers. He could only maintain his authority by keeping the prætorian guards in a good humour. Firmness and discipline had to be tempered with a liberal admixture of flattery and indulgence. In Severus's time the prætorian guards—originally the flower of Italian youth ("Italiæ alumni et Romana vere iuventus": Tacitus, Hist. i. 84)—were largely recruited from other parts of the Empire—*e.g.*, Macedonia and Spain. The bonds of discipline, which an honourable tradition of close association with the ancient centre of the Empire had helped to maintain, were thus gradually relaxed. The prætorians, having long enjoyed a virtual immunity for their excesses, had grown impatient of restraint. It is probable that Alexander's efforts to abridge the privileges of the prætorians were strongly backed by Ulpian, whose influence at Court since the removal of Flavianus and Chrestus[1] was almost unchallenged. After a lengthy period of plotting and counter-plotting and smouldering hatred, some accident precipitated the catastrophe in the year 228. A formidable riot broke out in Rome and lasted three days. Knowing his life to be in danger, Ulpian took refuge in the Imperial palace, but the angry soldiery forced their way in and slew him in the very presence of Alexander and Mamæa.[2] So powerful was the influence of Ulpian's enemies that Alexander did not venture openly to punish the ringleader of the riot, who was removed to a nominal post of honour in Egypt, and subsequently transferred to Crete. There he was quietly put out of the way some time afterwards, when the excitement caused by the riot had subsided.

Ulpian's Special Excellence as a Jurist.—Such was the life of this

[1] See above, p. 17. It is probable that Flavianus and Chrestus were opposed to the influence of Mamæa and to the curtailment of the privileges of the prætorians. An epitomator of Dion Cassius says they were removed by foul means to which Ulpian was privy, but there is no evidence to support this allegation. Flavianus and Chrestus are sometimes spoken of as Ulpian's predecessors, elsewhere as holding office for a time jointly with him.

[2] The whole story of the death of Ulpian is passed over by the writer of the life of Alexander Severus in the Augustan Histories—another example of the untrustworthiness of much of our material for the history of this period.

remarkable Roman who, thanks to the liberal extent to which Justinian's compilers drew on his works in composing the Digest, has probably exercised a larger influence over European jurisprudence than any other jurist. To say this is not equivalent to saying that he was one of the very greatest jurists. Ulpian was not a lawyer of the strong, originative type like Labeo, Salvius Julianus, and Papinian, the type that may be said to create—or, rather, to discover—the law. Ulpian's powers did not lie in the direction of arduous pioneer-work. His was rather the faculty of lucid, orderly exposition. Having mastered the whole domain of law as it then existed, he proceeded to apply a mind of singular shrewdness and perspicacity to a re-statement, in his own terms, of the rules of law on a large variety of topics. In his works the hard-won achievements of his great predecessors are set forth in a clear and agreeable style. Not that he was a mere compiler, a purveyor of other men's goods. It is true that the opinions of others figure rather prominently in his writings. But Ulpian did not simply reproduce other men's views. Whatever he took in was, so to speak, dissolved and re-crystallised. He had a keen appreciation of what was of permanent value in the literature before him. This he subjected to a criticism at once acute and practical. Rejecting what he deemed unimportant, he tested what remained with minute care, and expounded it afresh in his own clear way, pointing out the qualifications and limitations which the practical requirements of the law seemed to him to impose on the legal propositions under review.

Lucidity of his Style.—As regards style, Ulpian is a consummate master of lucid expression—indeed, with Gaius, the greatest master of clear exposition among the Roman jurists.[1] In his writings there is no mannerism, no affectation, no turgid rhetoric.[2] The language, as Dr. Roby points out,[3] is "the ordinary language of daily life and business among educated persons" of the time. In other words, it is simple and straightforward.[4] Such a style is not indeed without its drawbacks. True, we are spared the pedantries and artificialities of the lawyers of some other ages, but, on the other hand, there is an occasional looseness of expression, and in the flow of facile utterance[5] the real difficulties of legal problems are often in danger

[1] We do not possess very much of Ulpian's work in its original form, but, such as it is, it amply justifies the praise that has been bestowed on it. Even as "edited" in the Digest, he exhibits a remarkable power of lucid exposition.

[2] As to this, see below, p. 22, the observations of Austin.

[3] *Introduction*, p. 209. Dr. Roby is speaking of the classical jurists generally, but his remarks are particularly applicable to Ulpian.

[4] Of course it was not the language of Cicero, the "Latin pure, discreet" demanded by the fastidious scholarship of Browning's Bishop when ordering an inscription for his "Tomb at St. Praxed's Church":—

"Aha, 'elucescebat,' quoth our friend? No Tully, said I, Ulpian at the best!"

[5] In Cod. 6, 25, 10, the term "*disertissimus*" is applied both to Papinian and Ulpian. It seems far more appropriate to Ulpian than to Papinian.

of being hidden out of sight. For us, however, the very faults of Ulpian's style have proved an almost unmixed advantage. The extraordinary readiness of his pen enabled him to enrich juristic literature with an astonishing abundance of legal matter of the utmost value. His very diffuseness has helped us—as it helped the generations which succeeded him in the Roman Empire—to understand much that is difficult and obscure in his predecessors. Accordingly when Justinian's compilers came to compose the Digest, the writings of Ulpian were more liberally drawn upon than those of any other jurist. They supply, indeed, the whole groundwork of the Digest. The excerpts from Ulpian (2,462 in number, as compared with 2,080 from Paul and 595 from Papinian) form about one-third of the whole body of the Digest. Long as some of these excerpts are, they are very much shorter than the originals from which they were taken. For it was the business of the compilers "from vain excess to clear the encumber'd laws,"[1] and in performing their task they subjected Ulpian's writings to a very liberal process of pruning. A comparison of the Vatican Fragments 75 to 83 (containing the full text of Ulpian) with Digest 7, 2, 1, 2 to 4 and 7, 2, 2 and 3 (where the "vain excess" has disappeared) will illustrate the extent to which the process was carried.[2]

Alleged Decline of Roman Jurisprudence.—It is said that the decline of Roman jurisprudence commences with Ulpian and Paul.[3] It is true that neither Ulpian nor any of his successors ever attained to the same eminence as Julian or Papinian, and it is further true that the work of his successors shows signs of failing power. Nevertheless, the theory is apt to do some injustice to Ulpian. It would be difficult to find any definite symptom of decadence in his writings, any relaxing of the intellectual grip, any blurring of the clear, legal vision, any idle circumlocution doing duty for thought. The mere fact that Ulpian's powers lay in the particular direction we have tried to indicate (p. 19) is not enough to stamp him as a "decadent." A man of his special type might just as well have flourished, and done useful work, before as after Papinian. Among his contemporaries and successors he enjoyed an immense prestige, and, indeed, it was largely due to the influence of Ulpian's writings that the great tradition of Roman jurisprudence was so successfully upheld during the following centuries, when the faculty for

[1] "Son Giustiniano
Che . . .
Dentro alle leggi trassi *il troppo e 'l vano.*"
—Dante, *Paradiso* vi. 10–12.

[2] The two passages are set out, in a most instructive way, in parallel columns in Dr. Roby's *Introduction*, p. 73 ff. It is, however, hardly necessary to say that what the compilers rejected was not therefore necessarily "vain excess." The nature of their task compelled them to exclude all obsolete matter, and also much that was valuable, and even essential, from a literary point of view. It would be most unfair to appraise the literary quality of the jurists' writings by reference to the excerpts in the Digest alone.

[3] F. Hofman, *Kritische Studien zum römischen Rechte* (1885), p. 3 ff.

fully appreciating the grand achievements of the classical age was slowly but steadily dwindling. Ulpian's pupil Modestinus ("studiosus meus," Ulpian calls him in Dig. 47, 2, 52, 20), himself no mean judge of juristic capacity, ranks Ulpian with Scævola and Paul as one of the κορυφαῖοι τῶν νομικῶν, thus passing over Papinian altogether. And during the ensuing centuries the authority enjoyed by Ulpian in the Courts—especially in the Eastern half of the Empire—was second only to that of Papinian, a fact to which formal expression was given in Valentinian's Law of Citations, 426 A.D. (see Professor Clark's article, *loc. cit.*, p. 28).

Ulpian's Ius Naturale.—A brief reference may here be allowed to Ulpian's famous triple division of law into *ius civile*, *ius gentium*, and *ius naturale*, or law peculiar to the Romans, law common to all nations, and law common to human beings and animals. This division is not, as is sometimes suggested, peculiar to Ulpian. We cannot, of course, say how far it was adopted by the numerous other jurists whose writings have not been preserved to us. But as far as the Digest is concerned, it appears not only in the well-known passages from Ulpian in the first title of the first book, but also in two other passages, in one (from Tryphoninus, Dig. 12, 6, 64) explicitly, in the other (from Hermogenianus, Dig. 1, 1, 5) by necessary implication. Nevertheless, it is true (as Savigny has conclusively shown [1]) that the doctrine in question exercised no perceptible influence on the rules of Roman law, and cannot indeed be made to serve as a basis of legal classification. To admit this is not, however, equivalent to saying that the whole doctrine is as meaningless and absurd as Austin's unfortunate strictures might lead one to suppose. Savigny himself—adopting in its essentials the defence of Ulpian by Donellus (I. 6)—points out the true significance and value of Ulpian's theory. He reminds us of the important consideration that in every relation we must distinguish the matter and the form, and that the matter of a legal relation can be conceived of apart from its form. In the great majority of legal relations, such as ownership or obligation, the matter is *arbitrary*, in the sense that the human race could conceivably continue to exist without it. But what differentiates the relations mentioned by Ulpian—"maris atque feminæ coniunctio, liberorum procreatio, educatio"—is just the fact that their matter is *not* arbitrary, consisting, as it does, of natural relations, common to human beings and animals, without which the human race could not continue to exist. Ulpian's reference to "ius" ("videmus etenim cetera quoque animalia, feras etiam, istius iuris peritia censeri") is somewhat fanciful and bizarre, but it is ridiculous to suppose that he really imagined legal relations to subsist as between animals. All he wished to point out was that that which constitutes the matter (as distinct from the form) of certain fundamental legal relations between men, has its almost exact counterpart in the animal world. Nor is this a mere "foolish conceit" or "inept speculation" (Austin's *Jurisprudence*, 5th ed.,

[1] *System des heutigen römischen Rechts*, vol. i. Beilage I.

pp. 209, 210, 552). Ulpian's view, understood in the sense indicated, is, as Savigny says (*loc. cit.*), "not only true, but important and deserving of consideration," and, though useless as a basis of legal classification, its influence on legal thought in other directions—not only in Ulpian's time, but also centuries afterwards—was considerable. Savigny's treatment of Ulpian's theory affords an admirable model of the temper and spirit in which such questions must be approached if the discussion is to yield fruitful results. For what is the position? A lawyer of vast knowledge and experience, a man steeped in the traditions of a great legal and philosophical past, and working in an atmosphere of strenuous juristic endeavour, deliberately enunciates a particular theory. This theory is adjudged worthy of preservation three hundred years later by a body of lawyers of far more than average attainments. Centuries afterwards the theory is still found to exercise a strong influence over minds of the most different cast.[1] And, finally, in our own age, it is deemed worthy of patient examination by the greatest jurist of modern times. In face of such facts as these an attitude of half-petulant, half-supercilious contempt such as marks so much of Austin's criticism—an attitude which finds expression (unconscious expression, perhaps) in references to the "good" Ulpian and "this legal oracle"—is, we venture to submit, entirely futile and barren.

Ulpian's Idealism.—When Austin complained of Ulpian's Latin being "too declamatory" for his taste (*loc. cit.*, p. 563), he may have been thinking of such passages as the one just discussed, and those dealing with the nature of jurisprudence (Dig. 1, 1, 10, 2), and the functions of the jurist (1, 1, 1, 2). The term "declamatory" cannot, however (as we have endeavoured to show), be fitly applied to Ulpian's style, so that Austin's objection may have been intended for the matter rather than the form of Ulpian's statements. Of the passage on the *ius naturale* nothing more need be said. As to the other two passages, though they obviously have no claim to scientific precision, they are very far indeed from being mere "declamatory" rhetoric. They present, it is true, a somewhat exalted ideal of the nature of jurisprudence[2] and the functions of the true

[1] Austin himself mentions two—Hooker and Montesquieu. "A fustian description of law" is his urbane reference (*loc. cit.*, p. 211) to the definition of law in Hooker's *Ecclesiastical Polity* (I. c. 18). As for Montesquieu—whose robust sanity has earned for him the title of "the father of the modern historical method"—it is perhaps enough to say that it would be difficult to name a thinker less prone to "foolish conceits" and "inept speculations."

[2] We take Ulpian's meaning to be somewhat as follows: The business of the jurist is to ascertain the legal *truth*, either by testing existing rules of law, or by seeking to discover new rules. In doing this, he must keep two considerations—corresponding to two aspects of law—steadily in view. In the first place, he must consider the requirements of justice, which is the life-principle of law—*i.e.*, he must apply an *ideal* standard, a standard which, in its ultimate origin, passes beyond the limits of purely human things. This is the standard implied (though not always acknowledged) in the frequent appeals to a "higher justice," "equity," "the reason of mankind," and so forth.

jurist.[1] But even if they did nothing more than that, the fault, if fault it be, is surely on the right side. The law is continually beset with temptations from outside which tend to lower it from the proud dignity of a free science to the level of a smart trade. Our thanks are due to those who keep the higher ideal steadily before our eyes. Within the sphere of jurisprudence, as elsewhere, there is much to learn from the man who, in Emerson's phrase, "hitches his waggon to a star."

In the second place, he must consider the requirements of utility—*i.e.*, he must apply a *practical* standard, for the rules of positive law are intended to regulate human acts and human affairs. The greatest lawyer—be he judge or jurist—is he who combines a firm grasp of the material realities of life with a clear vision of the ideal beyond. "Iurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia."

[1] "Cuius (artis) merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et æqui notitiam profitemur, æquum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu pœnarum, verum etiam præmiorum quoque exhortatione efficere cupientes; veram, nisi fallor, philosophiam, non simulatam affectantes." Ulpian is speaking, of course, of the jurists of his own time. The peculiar bent of the national genius of the Romans tended to make the jurists regard their science as the "true philosophy." But Ulpian's remarks are not without value even for us.

THE DEATH DUTIES IN FOREIGN COUNTRIES.

[*Contributed by* His Grace the Duke of Argyll, K.T., G.C.M.G.]

The Finance Act of 1894 initiated one of the greatest changes of modern times in the fiscal system of the United Kingdom. The death duty not only taxes heavily all visible property, but may be wholly destructive of such property to the holder, if deaths occur repeatedly within a short time. The following statistics which I have collected as to the analogous duties in a number of foreign countries appear to me to form an instructive commentary on our English present experiment, and I have accordingly placed them at the disposal of the editors of this journal. I was prepared to have adduced certain arguments against the continuance of the tax in its present unequal incidence, pointing out the discouragement to investment of capital on landed estates and the equipment of factories, its tendency to drive money into foreign investments and secret kinds of property like jewels and bonds, the uncertainty of the incidence of the tax, which may strike often in a short time, and the inadequacy of insurance as a remedy; but as I understand that controversial matters are outside the sphere of the journal, I have contented myself with publishing the statistics regarding such taxes in some other countries.

Austria.

(*a*) From parents to legitimate or illegitimate children or their descendants, or *vice versa*, to adoptive children and to consorts not divorced at the time of death: 1 per cent. on the value with an addition of 25 per cent.[1]

(*b*) From parties to servants, etc., if the annuity does not exceed the amount of 50 florins annually or if the capital does not exceed 500 florins: 1 per cent. on the value with an addition of 25 per cent.

(*c*) To other relations, including cousins, than those described *sub* (*a*): 4 per cent. on the value with an addition of 25 per cent.

[1] *I.e.*, of the duty paid.

(*d*) In all other cases than mentioned *sub* (*a*), (*b*), and (*c*) : 8 per cent. on the value with an addition of 25 per cent.

In addition to these Imperial taxes, other contributions to public funds are charged. These, however, vary in the different provinces.

From all successions taking place in *Lower Austria*, where the net amount exceeds 300 florins, a contribution to the school fund is collected—this amounts in cases of 300 florins to 1,000 florins to 1 florin; from 1,000 to 5,000 florins, on each 100 florins, 25 kreuzers; exceeding 5,000 florins up to 10,000 florins, on each 100 florins, 30 kreuzers, and progresses proportionally. If the testator does not leave a consort or a heir at law, the fee is raised by 50 per cent.

Further, from all successions taking place in *Vienna*, a contribution is collected towards the hospital fund which is fixed in a progressive manner, and a further contribution of 1 per cent. of the net amount of the succession must be paid to the general maintenance fund. Outside of Vienna, in the Province of Lower Austria, in lieu of the two last-named contributions (hospital and maintenance fund), a fee to the poor fund must be paid. Also in the other provinces of Austria similar contributions towards public funds or benevolent institutions must be paid.

The provinces or municipalities are not authorised to collect any taxes on estates of deceased persons, but the town of Vienna has the right in cases of immovables to collect a so-called transfer tax which amounts to 10 per cent. of the net State duty *without* the addition of 25 per cent. Whether other towns are also privileged to collect a similar tax, is not known.

Belgium.

The following are the death duties in Belgium :—

(*a*) If the deceased inhabits the country, his heirs pay: between parents and children, 1 fr. 40 per cent. on real property only; between husband and wife, 5 fr. 50 per cent. on *all* property; between brother and sister, 6 fr. 80 per cent. on all property that they would have inherited *ab intestato* and 13 fr. 80 on the surplus; between nephew and niece, uncle and aunt, 8 fr. 20 per cent. on property they would have inherited *ab intestato* and 13 fr. 80 on the surplus; between all other degrees of consanguinity or to strangers in blood to the deceased, 13 fr. 80 per cent.

(*b*) The duties payable on real property only, if the deceased be not an inhabitant of Belgium, but the real property be situated there, are as follows: between parents and issue, 1 fr. 40 per cent.; between all other heirs, 6 fr. 80 per cent.

Under eventuality (*b*) no duties are levied on the transmission of personal property.

To determine whether they are lighter on all property passing to near relatives than the taxes now levied in England, one would have to take estate and succession duties together. The latter in Belgium are not separate.

In 1899 (the latest data obtainable) the death duties paid amounted to 17,350,000 fr. out of a total Budget receipt of 435,000,000 fr.—a very small proportion.

Brazil.

Summary of details of Law No. 2800 of January 19th, 1898 :—

Succession under Will :—

From father to son, or *vice versa*, 0·5 per cent.
From husband to wife, or *vice versa*, 5·5 per cent.
Between brother and sister or uncle (brother or sister of parents), 5·5 per cent.
Between cousins, according to degree of relationship, from 11 per cent. to 16·5 per cent.
Between strangers, 22 per cent.
If the heir belongs to a religious order, no matter what degree of relationship, 16·5 per cent.

Succession of Intestates :—

From husband to wife, or *vice versa*, 16·5 per cent.

Denmark.

Law of February 9th, 1861 concerning death duties : § 2 runs as follows :—
"Altogether the following dues are to be paid on :—
"(1) Inheritance accruing to consorts, direct descendants, or parents 1 per cent.
"(2) Inheritance accruing to brothers and sisters or their children (first side-line), 4 per cent.
"(3) Inheritance accruing to distant relations or persons not being relations, 7 per cent."

Law of November 30th, 1874, concerns the dues payable to the State for distribution of the estate of a deceased person by the Probate Court.

If all the heirs are of age and reside in Denmark, or have empowered a representative if they live abroad, they may themelves divide the estate amongst them. In this case they pay the death duties, but no Probate Court fees.

If, on the other hand, the Probate Court or an executor *testamenti* winds

up the estate, they pay $\frac{1}{3}$ per cent., or $\frac{2}{3}$ per cent.[1] of the whole of the assets without deduction of the liabilities of the deceased and $\frac{1}{2}$ per cent of the net amount of the estate. There will, of course, be some fees in addition if legal proceedings are taken for the settlement of debts or other matters concerning the estate.

A son who is his father's sole heir will in this way, if the father leaves a fortune of 100,000 kr. and a debt of 50,000 kr., inherit 50,000 kr. and accordingly pay: 1 per cent. of 50,000 kr. as death duties; and if the Probate Court winds up the estate, further: $\frac{1}{3}$ per cent. of 100,000 kr. and $\frac{1}{2}$ per cent. of 50,000 kr.

France.

By the new Succession Law the duties are graduated, rising in proportion to the value of the property inherited and the remoteness of the beneficiary's degree of relationship to the deceased, according to the scale shown in the table on p. 29.

The law also provides for the deduction of debts from an estate before it is assessed for death duties. Formerly the duties were levied on the gross assets of an estate, the debts being included therein, so that the successor had to pay a tax upon property which he did not inherit. The loss to the Exchequer resulting from this deduction of debts from assessable property will, it is computed, amount to about £2,200,000, but this loss will be compensated for by the higher scale of duties now enforced.

Another important change effected by the law is the manner of assessing, in cases of transfers *inter vivos* or of succession to estates of deceased persons, the value of the reversionary interest on an estate and that of the life interest. Before the new law was passed the successor to the reversionary interest had to pay a duty based on the entire value of the estate, and the successor to the life interest was taxed at an amount equivalent to half the duty which he would have had to pay if he had acquired the whole property. Thus in the event of the reversionary interest passing to one person and the life interest to another, the revenue authorities practically levied 50 per cent. of duty more than they were entitled to. According to the new law, if the estate be dismembered, the value of the reversionary interest and that of the life interest are to be determined separately, according to a scale based upon the age of the successor to the life interest, and the duty will be paid on the actual and respective values of these two elements, which taken together cannot exceed the value of the whole property.

As regards donations, the different rates of duty on real and personal property which used to exist have been abolished by the new law, and realty and personalty are now treated alike.

[1] $\frac{1}{3}$ per cent. if the heirs acknowledge the debt, $\frac{2}{3}$ per cent. if they declare that they will not be responsible for the debt, and only claim to inherit if assets exceed liabilities in the estate.

Degrees of Relationship.	Former Rate.	Rate under the New Law.							
	Proportional Duty on the Gross Value of Property up to any Amount.	Between 1 and 2,000 fr.	Between 2,001 and 10,000 fr.	Between 10,001 and 50,000 fr.	Between 50,001 and 100,000 fr.	Between 100,001 and 250,000 fr.	Between 250,001 and 500,000 fr.	Between 500,001 and 1,000,000 fr.	Over 1,000,000 fr.
	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.
1. In the direct line of succession ...	1·25	1·00	1·25	1·50	1·75	2·00	2·50	2·50	2·50
2. Husband or wife	{ 3·75 / 11·25[1] }	3·75	4·00	4·50	5·00	5·50	6·00	6·50	7·00
3. In the collateral lines of succession:									
Between brothers and sisters ...	8·125	8·50	9·00	9·50	10·00	10·50	11·00	11·50	12·00
Between uncles or aunts and nephews or nieces	8·125	10·00	10·50	11·00	11·50	12·00	12·50	13·00	13·50
Between grand-uncles or grand-aunts and grand-nephews or grand-nieces and between cousins-german	8·75	12·00	12·50	13·00	13·50	14·00	14·50	15·00	15·50
Between relations of the fifth or sixth degree	10·00	14·00	14·50	15·00	15·50	16·00	16·50	17·00	17·50
Between relations from the seventh to the twelfth degrees	10·00	15·00	15·50	16·00	16·50	17·00	17·50	18·00	18·50
4. Between strangers	11.25	15·00	15·50	16·00	16·50	17·00	17·50	18·00	18·50

[1] The duty of 11·25 per cent. was charged in the case of husband or wife only when the survivor came into possession through failure of heirs. This is now done away with.

Degrees of Relationship.	Scale Applicable to the Fraction of the Net Share comprised—							
	Between 1 and 2,000 fr.	Between 2,001 and 10,000 fr.	Between 10,001 and 50,000 fr.	Between 50,001 and 100,000 fr.	Between 100,001 and 250,000 fr.	Between 250,001 and 500,000 fr.	Between 500,001 and 1,000,000 fr.	Above 1,000,000 fr.
	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.
1. Direct line	1·00	1·25	1·50	1·75	2·00	2·50	2·50	2·50
2. Between husband and wife	3·75	4·00	4·50	5·00	5·50	6·00	6·50	7·00
3. Between brothers and sisters	8·50	9·00	9·50	10·00	10·50	11·00	11·50	12·00
4. Between uncles and aunts and nephews or nieces	10·00	10·50	11·00	11·50	12·00	12·50	13·00	13·50
5. Between great-uncles or great-aunts, grand-nephews or grand-nieces, and between cousins-german	12·00	12·50	13·00	13·50	14·00	14·50	15·00	15·50
6. Between relations in the fifth and sixth degrees	14·00	14·50	15·00	15·50	16·00	16·50	17·00	17·50
7. Between relations beyond the sixth degree and between persons not related	15·00	15·50	16·00	16·50	17·00	17·50	18·00	18·50

The only other amendment to be noted is the reduction of the duty on charitable and philanthropic legacies from 11¼ to 9 per cent.

Certain provisions of the new law, especially those relating to the deduction of debts, are so intricate that it is very difficult to summarise them. A translation of the text, will be found below (extract from Mr. Michael H. Herbert's report on the finances of France for 1901, pp. 10-12).

The law does not come into force until six months after the date of promulgation. Beneficiaries of the estates of persons dying on and after February 26th, 1901 (the date of promulgation), will consequently be allowed a delay of six months in which to file their statements. The present Budget is expected to derive little advantage from the new duties, as they will only be in force during four months of 1901, and their full effect will only be shown next year.

Appendix.—Extract from the Budget Law on February 25th, 1901, as to the Succession Duties on Death and *Inter Vivos* :—

"Art. 2. The duties on change of ownership by death on movable or immovable property shall be paid upon the net share received by each person entitled. They shall be levied without the addition of any tenths, upon each fraction of such share, in accordance with the scale set out in the table on p. 30.

"The provisions contained in the last paragraph but one of Art. 53 of the law of April 28th, 1816, concerning a surviving husband or wife are repealed."

Greece.

Succession duty in Greece is levied on property exceeding the value of 2,000 drachmas (£80 nominally).

(1) Those who inherit from fathers and mothers pay no succession duty.

(2) Brothers or sisters inheriting pay 2 per cent.

(3) Nephews or nieces pay 3 per cent.

All others pay 5 per cent. ; adopted sons and daughters are treated as non-relations and pay full duty (5 per cent.).

Holland.

Summary of the duties payable on succession and on transfer at death, in accordance with the law of May 13th, 1859 (Staatsblad 36) as amended and supplemented by the laws of May 28th, 1869 (Stblad. 95), of June 9th, 1878 (Stblad. 95), of December 31st, 1885 (Stblad. 263), and by the law of May 24th, 1897 (Stblad. 154), as the last-named is further amended by the law of January 29th, 1898 (Stblad. 35).

(*a*) *Succession duty* must be paid :—

(i) Upon the value of everything inherited or received out of the estate of any person who at the time of his death had his domicile in the

country, the said value having first been reduced by the amount of the funeral expenses and of such debts of the deceased as have been described in the manner prescribed by law.

The amount of this duty on property inherited or received, not taking into account the additional *opcenten* or percentage of increase levied, is as follows :—

(1) By blood relations in the direct line of descent from blood relations in the direct ascending line, or by husband or wife from wife or husband, and provided there be children the issue of their marriage, or any issue of such children, 1 per cent.

(2) By blood relations in the direct ascending line from blood relations in the direct line of descent, 3 per cent.

(3) By husband or wife from wife or husband, if there be no children the issue of their marriage, nor any issue of such children, 4 per cent.

(4) By brothers and sisters from brothers and sisters, 4 per cent.

(5) By nephew and niece, grand-nephew and grand-niece, from uncle and aunt, great-uncle or great-aunt, and conversely by uncle or aunt, great-uncle or great-aunt, from nephew or niece, grand-nephew or grand-niece, 6 per cent.

On any sum received in the cases enumerated under No. 4 and No. 5 in excess of the share which would have accrued in case of decease intestate, and also in all other cases not provided for, 10 per cent.

(ii) Upon gifts during lifetime, including surrender in consideration of the performance of religious services or duties to corporations or institutions of mortmain: the amount of this duty is always 10 per cent.

(*b*) *Transfer duty* must be paid over and above the succession duty, on the value of stocks and of claims bearing interest (without deduction for debts).

The law includes under the term "stocks" all shares in home and foreign loans and funds, in companies or undertakings of which the capital is represented by shares, the provisional certificates of payments on all such shares, the so-called founders' shares, balance certificates, certificates of right, of participation (*actions de jouissance*) and the like, which, after redemption of the original shares, remain, or are granted to the holders and also, generally, all items which, under whatsoever name, can be ranked among the public stocks and shares.

This duty is :

(1) In the direct line of ascent and descent, and between husband and wife leaving a child or children the issue of their marriage, or issue of such children, $\frac{1}{4}$ per cent.

(2) In all other cases, 2 per cent.

(*c*) *Transfer duty* must be paid on all real property situate or established

within the Dutch realm in Europe inherited or received on the decease of any person who at the time of his death had not his domicile in the Netherlands: the amount of this duty is in all cases 6 per cent.

N.B.—These duties on succession and transfer are increased by a certain additional percentage thereon, the amount of which is determined each year by the Finance Law, and since 1841 has been 38 per cent.

In order to prevent fraud, the law of May 24th, 1897 (Staatsblad 154), has so far extended the duties described *sub* (*a*) (1) and (*b*) on succession and transfer, that these duties can in the cases defined by the above law also be levied on profits which do not in fact form part of the estate, but by legal fiction may be regarded as accruing to the estate at the time of decease.

Hungary.

Succession duty in case of death :—

(i) *On Personal Estate :—*

From parents—

(*a*) to their legitimate children and the descendants of the latter, and *vice versa*, 1 per cent. ;

(*b*) to their illegitimate children and the descendants of the latter, and *vice versa* ; to their step- and adoptive children ; to the consorts of the before-mentioned and their descendants ; and finally to the consort of the deceased, legally not divorced at the time of death, $1\frac{3}{10}$ per cent. ;

(*c*) to other relatives, including cousins, 5 per cent.

(ii) *On Real Estate :—*

Besides the above duty, in case (*a*) additional, $1\frac{5}{10}$ per cent. on the value of the estate ; in cases (*b*) and (*c*) additional, $1\frac{9}{10}$ per cent. on the value of the estate.

Italy.

(i) **Succession by Law and by Will.**—According to the provisions of the Italian Civil Code, an estate passes to the heirs either by law or by will ; the transfer by law, however, only takes place when succession by will is partly or entirely wanting.

Succession by law takes place according to the following general rules :—

The father and mother are succeeded by their legitimate children and their descendants, in the term "legitimate children" being included also children legitimised or adopted and their descendants. Failing children, brothers and sisters and their descendants, the parents are the heirs, and failing the latter, the other relatives in the ascending line ; when, however, the estate is suc-

ceeded to by the parents together with the brothers or sisters of the deceased, the division must be made in such a way that the portion accruing to the parents shall not be less than one-third. Failing offspring or relatives in the ascending line, brothers and sisters and their descendants shall be the successors. Should all the above-named heirs be wanting, the estate is determined in favour of the other nearest relatives in whatever degree, but not to those of the tenth degree; beyond which the estate accrues by law to the State.

The law further guarantees in all cases the right to a portion of the estate on the part of natural children whose filiation has been legally acknowledged and declared, and on the part of the surviving husband or wife against whom a sentence of personal separation shall not have been pronounced in justice.

Succession by will is regulated by provisions which limit the portions of the estate which may be legally disposed of by the will. Such portion is to the amount of one-half of the property when they are direct descendants (legitimate and legitimised children and their descendants), to whom by law the other half is reserved and forms their legal portion. If there are no descendants but only ascendants, these are entitled to a portion of not less than one-third of the estate, and the testator can freely dispose of the other two-thirds. Failing both ascendants and descendants, the testator can dispose of the whole of his property subject to the claims:—

(1) Of the surviving wife (or husband) against whom there shall not exist a sentence of personal separation pronounced in justice; such survivor is entitled to the usufruct of a portion of the estate which is greater or less according as there are or are not other heirs (in the ascending or descending line) entitled to a legal portion.

(2) Of the natural children legally acknowledged, to whom, if there are claims of other legal heirs to be satisfied, there accrues one-half of the proportion which would have fallen to them if they had been legitimate children or two-thirds of such portion if other legal heirs are wanting.

Further particulars are to be found in the Italian Civil Code (Book III., Division II., Chapter I., ss. 3 to 5, and Chapter II., s. 5).

(ii) **Succession Duties.**—The transfers of property by reason of death are notified to the registry office by means of "*denunciation*." The obligation to effect this notification under penalty of a fine is incumbent on the heirs, legatees, their guardians and wardens, the administrators of the estate and the executors of the will. The notification must be made within four months, and in special cases within a longer period, on the form provided by the registry office, and must contain a specification of the landed property and other objects determined in the estate, with sufficient information to show its nature, situation, and importance. There shall also be a declaration of the value of the same, which shall be checked by the registry office, the liabilities

being set off in deduction of the estate value. In the case of succession by will, there must be appended to the notification further an authenticated copy of the will regulating the succession.

As steps taken by the heirs in connection with the above notification may be insufficient in consequence of opposing interests, the duty of notification is checked and supplemented by the obligation imposed by law on all public officials and servants, magistrates, lawyers, and attorneys, not to proceed with steps which may relate to succession without making sure that the corresponding notifications to the registry office have been made and to hand in a "denunciation" to the said office in case of a failure to effect this notification, under penalty of a fine. The registrars shall likewise take care not to overlook possible omissions to notify successions, and in fact the persons entrusted by law with the care of the civil registers are obliged, under penalty of a fine, to forward to the district registry office on an appropriate form a list of the deaths which have occurred in each period of three months, and the heads of the communal administration are required to furnish the registry office with all information which may be demanded for the verification of the nature of the estates administered by them.

The value of the estate assets being fixed in agreement with the heirs or as the result of legal proceedings, the succession duty is deducted from the same with fiscal privilege according to the amount indicated in the schedule annexed to the law.

The succession duties in Italy up to the year 1902 are as follows (see Articles 106 and 114 of the schedule annexed to the Law of Registration Chapters first and last, May 20th, 1897, No. 217):—

	PER CENT.
Transmission in a direct line—*i.e.*, from and to ascendants and descendants (excluding adopted children)	1·60
,, from and to ascendants and adopted children	Half of the normal duties which would be due without adoption
,, between husband and wife	4·50
,, in favour of charitable and similar institutions and mutual aid societies legally acknowledged	5
,, between brothers and sisters	7
,, between uncles and nephews, great-uncles and grand-nephews	8·50
,, between cousins	12
,, between other relatives and collateral relatives up to the tenth degree	13
,, between relatives beyond the tenth degree and people connected or strangers, or in favour of various institutions not charitable or similar	15

Degree of Relationship.	Proportional Duty per 100 Lire According to the New Scale for each Portion Inherited.						
	From 301 to 1,000 lire.	From 1,001 to 50,000 lire.	From 50,001 to 100,000 lire.	From 100,001 to 250,000 lire.	From 250,001 to 500,000 lire.	From 500,001 to 1,000,000 lire.	Beyond 1,000,000 lire.
Between ascendants and descendants in the direct line	0·80	1·60	2·00	2·40	2·80	3·20	3·60
Between husband and wife	3·00	4·50	5·00	5·40	5·80	6·20	6·60
	Up to 50,000 lire						
Between sisters and brothers	7·00		7·50	8·00	8·50	9·25	10·00
Between uncles and nephews	8·50		9·25	10·00	11·00	12·00	13·00
Between great-uncles and grand-nephews ...	10·00		10·80	11·60	12·60	13·80	15·00
Between other relatives up to the sixth degree	12·50		13·50	14·50	15·70	16·80	18·00
Between other relatives beyond the sixth degree and strangers	15·00		16·30	17·60	19·00	20·50	22·00

Proceeds from Succession Duties in the Years 1898—1902.

Financial Years.	Between ascendants and descendants, exclusive of adopted children.	Between ascendants and adopted children.	Between husband and wife.	In favour of charitable institutions, mutual aid societies, etc.	Between brothers and sisters.	Between uncles and nephews, great-uncles and grand-nephews.	Between cousins-german.	Between other relatives and collateral relatives up to the tenth degree.	Between relations beyond the tenth degree and strangers, or in favour of various institutions not charitable or similar.	Total of the receipts for succession duties.
	Lire.	*Lire.*	*Lire.*	*Lire.*	*Lire.*	*Lire.*	*Lire.*	*Lire.*	*Lire.*	*Lire.*
1897–8	9,255,759	118,707	3,557,613	759,107	5,997,874	8,544,695	690,184	708,711	5,370,770	35,003,420
1898–9	9,761,238	128,953	3,439,292	718,612	5,929,499	8,070,691	564,153	987,667	4,832,310	34,432,415
1899–1900	9,593,495	90,133	3,904,884	825,057	6,074,503	7,898,868	613,783	686,233	5,651,924	35,338,880
1900–1	10,938,123	260,034	4,186,637	1,013,005	6,267,649	8,548,049	689,519	1,906,663	4,957,184	38,766,863
1901–2	9,813,428	101,593	3,861,747	850,404	5,754,635	7,943,524	661,451	1,425,396	4,970,301	35,382,479

The law of January, 1902, No. 25, radically modified the fiscal system of succession duties in Italy, introducing into the scale the principle of progression in the duty.

For succession between ascendants and descendants in the direct line and between husband and wife the new law provides privileged terms by exempting them from duty when the total amount of the estate assets does not reach 100 lire, and subjecting them to the fixed duty of 1 lira for each individual portion which does not exceed 300 lire. For charitable institutions the duty is proportional, but not progressive, and is 5 per cent., as in the preceding scale.

In all other cases the duties are proportional and progressive, as will be seen from the schedule on p. 35. There is a reduction as compared with the tariff previously in force for the portion accruing by inheritance not exceeding 1,000 lire, and a progressive increase for those above 50,000 lire in successions from or to ascendants or descendants or husband and wife. In other forms of succession likewise the new scale is higher than the preceding one for inherited portions of corresponding value.

(iii) **Statistics of Succession Duty Receipts.**—The data relating to receipts by the Treasury for succession duties in the schedule on p. 37 refer to the last five years of the old law being in force—*i.e.*, up to June 30th, 1902. The new law really came into force on March 5th of that year, but the provisions contained therein did not begin to make themselves felt until the second half of the same year, as for the payment of the duty there is allowed to the taxpayer a period of at least six months; and it will be understood that only with the financial year of 1902–3 [1] will the receipts under the head of succession duties be on the basis of the new scale approved in the said law of January, 1902.

Portugal.

The death duties in Portugal are subject to a supplementary tax of 5 per cent. by a law dated June 25th, 1898, and a stamp duty of 2 per cent.; consequently they work out as follows: parents and grandparents pay 5 per cent. or, with additionals, 5·355 per cent.; husbands or wives, 7½ per cent., or, as before, 8·032 per cent. in all; brothers and sisters (collaterals in the second degree), 10 per cent., or 10·710 per cent.; strangers in blood, 15 per cent., or 16·065 per cent. But these percentages are often far beneath the amount really paid on account of the way in which the duty is levied as regards real estate, as an instance will show.

Foros—that is, an annual charge in perpetuity, paid generally in kind for lands, houses, etc.—are very common in Portugal, and if they date from

[1] The financial year adopted in the accounts of the Italian State commences on July 1st and ends on June 31st of the following solar year.

before 1867 have generally a clause providing that every time the tenant's land is sold the ground landlord shall receive a percentage of the price paid—this is called *laudemio*, and varies between 2½ and 10 per cent. of the purchase money. Naturally the ground landlord rarely has the luck to receive such a fine, because tenants have recourse to all sorts of subterfuges to avoid selling, such as granting leases, making a gift of their rights—in fact, anything but selling. It often happens, too, that the ground rent is a mere trifle, whereas the tenant's right is valuable owing to improvements.

Supposing, therefore, that a deceased person leaves a foro of, say, fifty sacks of wheat annually, and a *laudemio* or fine of 10 per cent. of the purchase money every time the tenant right passes by sale, the value of the wheat is fixed by the local authorities at a price which may be more than the market price current. The value of the wheat being thus fixed, the duty by law may not be levied on a lesser valuation than twenty years' purchase, although the market value of such ground rent is as a rule from twelve to fifteen years' purchase. There must also be included in the valuation the amount of one fine or *laudemio*, and as this is an unknown quantity, it is calculated by taking the yearly income the tenant is supposed to derive from the property as shown by the assessment rolls by which the annual land tax is levied. From that income the ground rent is deducted, and the remainder multiplied by twenty (years' purchase) is assumed to be the market value of the tenant right, upon which the fine of 10 per cent. is to be calculated.

In this way a ground rent with a market value of £200 may be shown to be worth £400, and the stranger in blood, taking it under a testamentary disposition and who ought to pay 16 per cent., will really pay 32 per cent. of the market value.

The same principle that no valuation is accepted which is inferior to the yearly income of real estate shown by the assessment role, applies in all cases both for a conveyance *causa mortis* and by purchase; and when by chance owing either to a want of political influence, or to inadvertence, a person's real estate happens to be highly assessed, it works out to a very serious loss when the property has to pass by sale. On the other hand, there are some good points in the law. For instance, a person acquiring real estate *causa mortis* upon which duty has to be paid is allowed to pay the same in five half-yearly instalments, and can take possession of the estate by registering thereon a mortgage for the amount unpaid.

Prussia.

The rates of taxation in Prussia on inherited property (probate duty) are as follows, under the 1873 Law, amended in 1891 and 1895:—

(*a*) 1 per cent. on legacies to persons forming part of the household and in the service of the testator in the form of pensions, revenues, and other charges for life.

(*b*) 2 per cent. on legacies to adopted or children of different marriages and their descendants, and to brothers and sisters and their issue.

(*c*) 4 per cent. on legacies to relations, up to the sixth grade, to step-children and their descendants, to step-parents, to children and parents-in-law, and to natural children who have been recognised.

(*d*) 8 per cent. in all other cases.

Freed from probate duty are :—

(1) Properties outside Prussia, when inherited.

(2) Legacies not exceeding £7 10*s*.

(3) Legacies to relatives in the ascending line and to legitimate or legitimised descendants, as also to illegitimate descendants as regards property left by their mother and her relatives in the ascending line.

(4) Legacies to husband or wife, and to persons of the household or in the service of the testator up to an amount of £45.

(5) Legacies to the State or charitable institutions.

Saxony.

The taxation of legacies in Saxony is regulated by two statutes, passed in 1876 and 1880 respectively, the provisions of which are set out below. It will be noted that the revising statute of 1880 raised the duties exacted from legacies to a very considerable extent.

1876.

The following are exempt from the payment of succession duty : Husbands and wives of the testator, those relatives entitled to a compulsory share of the property, brothers and sisters, whether of the whole or the half blood, and their descendants in the first degree.

The following pay 3 per cent. :—

(1) Those relatives not entitled to a compulsory share, down to the fourth degree, exclusive however of brothers and sisters of the whole or the half blood, and their descendants in the first degree.

(2) Step-children and their descendants, and step-parents.

(3) Parents and children-in-law.

5 per cent. in all other cases.

1880.

The following are exempt from the payment of succession duty : Husbands and wives of the testator, and those relatives entitled to a compulsory share of the property.

The following pay 2 per cent. : brothers and sisters ; 3 per cent : descendants of brothers and sisters in the first degree, children-in-law, and

step-children; 4 per cent.: descendants of brothers and sisters in the second degree, brothers and sisters of the father and mother, the descendants of step-children in the first degree, parents-in-law, and step-parents; 6 per cent.: descendants in the first degree of brothers and sisters of the father and mother; 8 per cent. in all other cases.

Spain.

The matter is governed by the law of 1900, appended to which is a schedule or tariff, Nos. 28 to 38, which regulates inheritances, donations *mortis causa*, etc., the rate being from 1·40 pesetas per cent. between legitimate ascendants and descendants to 12·60 between collaterals beyond the sixth degree.

On dissolution of matrimony the portion of property brought to the matrimonial society pays, per No. 67 of tariff, pesetas 0·25 per cent.

The assignment of a proportion of the property acquired during matrimony to the surviving party pays, per No. 68 of tariff, pesetas 0·40 per cent.

Property willed for the sole use only of the surviving party pays, per No. 30 of tariff, pesetas 1·40 per cent.

The non-legitimate portion of the property, if willed to the surviving party in property, pays, per No. 39 of tariff, pesetas 4·20 per cent.

Inheritance by ascendants and legitimate descendants, or children legitimised by subsequent marriage, pays, per No. 28 of tariff, pesetas 1·40 per cent

Inheritances by relatives of second degree (nephews) pay, per No. 32 of tariff, pesetas 5·60 per cent.

The following is an example:—

Husband Wife
bring to matrimony
£5,000 £3,000
They acquire during matrimony
£17,000.

Inventory.

£25,000 total
8,000 brought to matrimony.

£17,000 acquired in matrimony.

On death of husband, the legitimate portion of the estate due to the wife is:—

£3,000 her share of brought-in capital.
8,500 half of property acquired during matrimony.

£11,500 her legitimate portion.

The rest over and above £11,500—*i.e.*, £13,500—is the non-legitimate portion.

Sweden.

The following table shows the various scales of duty payable by Swedish beneficiaries under a will or as heirs. The tax runs from a minimum of ½ per cent. to a maximum of 6 per cent. No difference is made between real and personal property, and the word "share" used throughout means amount of each portion of an estate to which any person may succeed. As the "shares" increase in value the variation of graduated percentages covers larger differences.

A Swedish "crown" is worth a little over 1*s.* 1*d.* (eighteen go to the pound sterling), and is divided into one hundred "öre."

In accordance with the Law of Stamp Duties dated June 2nd, 1899, a succession duty is imposed upon the heirs of a deceased person in the following manner:—

(1) In respect of shares devolving on (*a*) an issue of the body by way of inheritance or by a will, or (*b*) by way of a will, on a surviving spouse or a descendant of an issue of the body:—

Kr.	0·50	for every	100	kr.	of any shares amounting to	400	kr., not exceeding	2,000	kr.
,,	0·60	,,	,,	,,	,,	2,000	,,	4,000	,,
,,	0·70	,,	,,	,,	,,	4,000	,,	6,000	,,
,,	0·80	,,	,,	,,	,,	6,000	,,	8,000	,,
,,	0·90	,,	,,	,,	,,	8,000	,,	10,000	,,
,,	1·00	,,	,,	,,	,,	10,000	,,	12,000	,,
,,	1·10	,,	,,	,,	,,	12,000	,,	25,000	,,
,,	1·20	,,	,,	,,	,,	25,000	,,	40,000	,,
,,	1·30	,,	,,	,,	,,	40,000	,,	55,000	,,
,,	1·40	,,	,,	,,	,,	55,000	,,	75,000	,,
,,	1·50	,,	,,	,,	,,	75,000 kr. or more.			

Any share not amounting to 400 kr. does not pay any duty in this class.

(2) In respect of shares devolving, by way of inheritance or by a will, on the father or mother of the deceased, or on a brother, a sister, or on issue of the body of a brother or sister of a deceased person:—

Kr.	0·50	for every	100	kr.	of any shares amounting to	200	kr., not exceeding	500	kr.
,,	0·60	,,	,,	,,	,,	500	,,	1,000	,,
,,	0·70	,,	,,	,,	,,	1,000	,,	1,500	,,
,,	0·80	,,	,,	,,	,,	1,500	,,	2,000	,,
,,	0·90	,,	,,	,,	,,	2,000	,,	2,500	,,
,,	1·00	,,	,,	,,	,,	2,500	,,	3,000	,,
,,	1·10	,,	,,	,,	,,	3,000	,,	3,500	,,
,,	1·20	,,	,,	,,	,,	3,500	,,	4,000	,,
,,	1·30	,,	,,	,,	,,	4,000	,,	4,500	,,
,,	1·40	,,	,,	,,	,,	4,500	,,	5,000	,,
,,	1·50	,,	,,	,,	,,	5,000	,,	5,500	,,
,,	1·60	,,	,,	,,	,,	5,500	,,	6,000	,,

Kr. 1·70	for every 100 kr.	of any shares	amounting to	6,000 kr.,	not exceeding	6,500	kr.		
,, 1·80	,,	,,	,,	,,	,,	6,500	,,	7,000	,,
,, 1·90	,,	,,	,,	,,	,,	7,000	,,	7,500	,,
,, 2·00	,,	,,	,,	,,	,,	7,500	,,	8,500	,,
,, 2·10	,,	,,	,,	,,	,,	8,500	,,	10,000	,,
,, 2·20	,,	,,	,,	,,	,,	10,000	,,	15,000	,,
,, 2·30	,,	,,	,,	,,	,,	15,000	,,	20,000	,,
,, 2·40	,,	,,	,,	,,	,,	20,000	,,	25,000	,,
,, 2·50	,,	,,	,,	,,	,,	25,000	,,	30,000	,,
,, 2·60	,,	,,	,,	,,	,,	30,000	,,	35,000	,,
,, 2·70	,,	,,	,,	,,	,,	35,000	,,	40,000	,,
,, 2·80	,,	,,	,,	,,	,,	40,000	,,	45,000	,,
,, 2·90	,,	,,	,,	,,	,,	45,000	,,	50,000	,,
,, 3·00	,,	,,	,,	,,	,,	50,000 kr. and more.			

Any share not amounting to 200 kr. has not to pay any duty in this class.

(3) Where, by way of inheritance or by a will, any share devolves upon a person being in a remoter relationship to the deceased than above described, also where, by way of a will, any share devolves upon a person not being in any relationship to the deceased, nor being his (her) surviving spouse, the following taxes are payable :—

Kr. 0·50	for every 100 kr.	of any shares	amounting to	200 kr.,	not exceeding	500	kr.		
,, 0·75	,,	,,	,,	,,	,,	500	,,	1,000	,,
,, 1·00	,,	,,	,,	,,	,,	1,000	,,	1,500	,,
,, 1·25	,,	,,	,,	,,	,,	1,500	,,	2,000	,,
,, 1·50	,,	,,	,,	,,	,,	2,000	,,	2,500	,,
,, 1·75	,,	,,	,,	,,	,,	2,500	,,	3,000	,,
,, 2·00	,,	,,	,,	,,	,,	3,000	,,	3,500	,,
,, 2·25	,,	,,	,,	,,	,,	3,500	,,	4,000	,,
,, 2·50	,,	,,	,,	,,	,,	4,000	,,	4,500	,,
,, 2·75	,,	,,	,,	,,	,,	4,500	,,	5,000	,,
,, 3·00	,,	,,	,,	,,	,,	5,000	,,	5,500	,,
,, 3·25	,,	,,	,,	,,	,,	5,500	,,	6,000	,,
,, 3·50	,,	,,	,,	,,	,,	6,000	,,	6,500	,,
,, 3·75	,,	,,	,,	,,	,,	6,500	,,	7,000	,,
,, 4·00	,,	,,	,,	,,	,,	7,000	,,	7,500	,,
,, 4·25	,,	,,	,,	,,	,,	7,500	,,	10,000	,,
,, 4·50	,,	,,	,,	,,	,,	10,000	,,	15,000	,,
,, 4·75	,,	,,	,,	,,	,,	15,000	,,	20,000	,,
,, 5·00	,,	,,	,,	,,	,,	20,000	,,	25,000	,,
,, 5·25	,,	,,	,,	,,	,,	25,000	,,	30,000	,,
,, 5·50	,,	,,	,,	,,	,,	30,000	,,	35,000	,,
,, 5·75	,,	,,	,,	,,	,,	35,000	,,	40,000	,,
,, 6·00	,,	,,	,,	,,	,,	40,000 kr. and more.			

Shares not amounting to 200 kr. do not pay any duty in this class.

The respective amounts concern the net value of the shares and are payable as stamp duties on entering in the Probate Court the inventory of the estate of the deceased.

It should be remarked that a real estate devolving upon a person by inheritance is released, after above-mentioned stamp duty being paid, from any further duty, otherwise payable on entering a real estate in the special register of such estates, but that, in respect of a real estate devolving upon a person by a *will*, a further stamp duty of 60 öre for every 100 kr. of the value of same is payable on entering it in the last-mentioned register.

It should further be observed that in most *towns*, as a privilege to them, a probate duty of $\frac{1}{2}$ up to 1 per cent. is payable in the nature of a tax on the net value of the whole estate of a deceased person, after deducting debts, for the purpose of paying the magistrates and for sustaining other public institutions.

THE SUPREME COURT OF THE UNITED STATES: ITS PLACE IN THE CONSTITUTION.[1]

[*Contributed by* The Hon. Joseph H. Choate, *the United States Ambassador.*]

Its Origin.—I invite your attention to a brief study of the Supreme Court of the United States, a cardinal feature of our Federal representative Government, balancing and harmonising all its parts, a tribunal which has received the general approval and admiration of foreign jurists and statesmen, and commands the universal respect and confidence of the people for whom it administers justice.

The Federal Convention of 1787, which framed our Constitution and created this unique tribunal, was composed mostly of members of the legal profession, which has always in America been the chief nursery of statesmen; but Washington, the soldier, presided, and Franklin, the philosopher, advised at every step. The members of the Convention were undoubtedly chosen from the best qualified men that the country could furnish for the momentous work which was set before them, and their merits have been so universally recognised that I need not repeat any of the emphatic tributes which many great Englishmen have paid to the results of their labours.

Their work was finished in four months' secret session at Philadelphia, but most of them had been in training for it through twenty long years of time and trouble.

From 1765, the time of the passage of the Stamp Act, which was passed through both Houses of Parliament with little opposition, the colonists, and especially the lawyers of the Colonies, had been careful and earnest students of the principles of free government.

In 1774, having exhausted in vain all appeals to King and Parliament for a redress of their grievances, they sent delegates to a Continental Congress to deliberate on the state of public affairs, and in this Congress, which lasted for seven years, many of the future framers of the Constitution who were members of it found a most instructive school of statesmanship, and constantly devoted themselves to the social and political education of

[1] An address delivered before the Political and Social Education League, May 13th, 1903, by Mr. Choate, and reprinted here by the kind permission of the proprietors of the *North American Review.*

the colonists in matters of government and of public law and popular rights.

The Declaration of Independence.—In 1776, as the representatives of the United States of America in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of their intentions, they did, "in the name and by the authority of the good people of the Colonies, solemnly publish and declare that these United Colonies are, and of right ought to be, free and independent States; that they are, and of right ought to be, absolved from all allegiance to the British Crown; and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved." They declared "that as free and independent States they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do," and for the support of this declaration, with a firm reliance on the protection of Divine Providence, they mutually pledged to each other their lives, their fortunes, and their sacred honour.

From the hour of the Declaration, the men who made it, and all the other statesmen of the Colonies, had to give renewed and constant study to the whole science of government.

As they proved able by force of arms to make good this declaration, the United Colonies became from its date a new nation, over which Congress, by general consent and acquiescence, exercised the powers of a general Government, for all the purposes of the very serious exigency which had called it into existence. But it was a Government by Congress only, with feeble and undefined powers, without an executive and without a judiciary. While the war lasted it barely sufficed, and afforded daily object-lessons of its own defects, and of what was required for a better Government when better days should come.

The Constitution-Making Epoch.—The several individual States, being absolved from the Royal Charters under which they had before practically managed their own affairs, adopted written Constitutions, based in each case upon the sovereignty of the people, to take the place of the former dominion of Parliament. An epoch of Constitution-making set in, during which the principles of representative popular government were discussed and understood. Virginia, the largest of the States, the home of Washington, Jefferson, Madison, and Monroe, who were to be four out of the first five Presidents of the United States, took a leading part. New Hampshire had already framed a temporary form of Government "during," as they said, "the unhappy and unnatural contest with Great Britain." South Carolina and New Jersey had followed, but in the case of the former it was expressly declared that the Constitution established was "established until an accommodation of the unhappy differences between Great Britain and America could be obtained."

Massachusetts, in 1780, with the utmost pains and deliberation prepared and adopted a complete Constitution, in which the powers of Government were carefully distributed, with the solemn declaration that neither the legislative, executive, nor judicial department should ever exercise the powers of either of the others, "to the end that it may be a government of laws and not of men." During the war the other Colonies were engaged in the same business of founding States upon the principles of civil and religious liberty, embodied in written Constitutions. Rhode Island alone, founded by Roger Williams, the great apostle of Toleration, having received from Charles II. in 1663 a Royal Charter, subsisted under it until 1842 without adopting any written Constitution.

But it was not only in the individual States that the framers of our Constitution were in all those years gathering knowledge and experience in the science of popular Government. From the very date of the Declaration, Congress, conscious of the inadequacy of its powers, even for the purposes of carrying on war and conducting foreign affairs, entered upon the novel and difficult task of arranging a scheme which should enable it more efficiently to those affairs which were of common interest to all the people of the thirteen States, and which no one of them, nor all of them individually, could control. After two years they adopted and submitted to the States what they styled "Articles of Confederation and perpetual Union," but it was not until March, 1781, that the powers of Congress were enlarged by the final ratification of these articles by the delegates of all the States.

Congress and National Government.—But this attempted bond of union—a crude experiment in the formation of a National Government—proved little better than a rope of sand, and utterly failed to accomplish the purposes intended. While the war lasted the tremendous pressure of their common danger and common distress kept the States together, and made them obedient to the requests of Congress, which really had no power to command, but as soon as this external pressure was taken off, they fell apart, and each asserted its independent sovereignty.

So jealous were the States, which had just escaped from the dominion of one central power, of anything which should seem to create dominion over them in another, that although upon paper they had laid many restraints upon their own action, and conferred upon Congress extensive powers over their Federal affairs, they had carefully refrained from giving any sanction to those powers, and from granting to Congress the means of compelling obedience to its enactments. The Articles provided for no Federal executive and for no judiciary department, although they authorised Congress to provide for the settlement of boundary disputes between States, and to appoint Courts of prize and for the trial of piracies and felonies on the high seas. Moreover, Congress could not of its own authority raise a dollar of money for revenue, or a single man to recruit its armies. It could only make requisitions for men and money upon individual States, which

met them or not as they found it convenient. Nor could it proceed at all in the exercise of the principal powers nominally conferred upon it until nine States assented to the same. One of the leading writers of the time thus describes the powers of Congress under this Confederation :—

> By this political compact the United States in Congress assembled have exclusive power for the following purposes, without being able to execute one of them. They may make and conclude treaties, but can only recommend the observance of them. They may appoint ambassadors, but cannot defray even the expense of their tables. They may borrow money in their own name on the faith of the Union, but cannot pay a dollar. They may coin money, but they cannot purchase an ounce of bullion. They may make war and determine what number of troops are necessary, but cannot raise a single soldier. In short, they may declare everything, and do nothing.

Judge Story says that, strong as this language is, it has no colouring beyond what the naked truth would justify, and even Washington himself wrote : "The Confederation appears to me to be little more than a shadow without the substance, and Congress a nugatory body, their ordinances being little attended to."

Of course, under such a system our national affairs drifted steadily and rapidly from bad to worse. Interest on the public debt could not be paid, nor the ordinary expenses of government be provided for. The treaties which had been made could not be carried out, and foreign nations would not deal in the way of new treaties with the envoys of a body which had no head and no power to perform what they should agree to in its behalf. Our external commerce was at the mercy of foreign nations, whose laws contrived for its destruction. Congress could do nothing to counteract. And worst of all, our domestic commerce, which between all the citizens of one nation should be free and equal, was at the mercy of the caprice or selfishness of each individual State. There were many boundary disputes between States which threatened civil war. Federal laws were a dead letter, without Federal Courts to expound and define their true meaning and operation, or an executive to see that they were properly executed. There was a general failure as yet to realise in actual enjoyment the advantages we had won by seven years of war, and everything seemed drifting towards bankruptcy, disunion, and anarchy.

Looking for a Constitution.—But these very defects of the Confederation, and the evils which resulted from them, demanded the constant exercise of the best brains in all the States to understand and to remedy them, and opened a new school for all our statesmen in the study of Constitutional Government. When Washington had laid down his sword and surrendered his commission to Congress, after the signing of the Treaty of Peace which acknowledged the independence of the United States, he exhorted his countrymen by all they held dear to provide for the establishment of a strong and stable Government as the only hope of retaining the liberties

they had won; and from that hour until the Federal Constitution was made and ratified, he and Hamilton, and Franklin and Madison, and all the other great statesmen who made it or helped to secure its adoption, were engaged in the constant study of the principles of free government, and in enforcing them upon the attention of their fellow citizens, so that they came to the performance of their great duties in the Federal Convention as graduates of the best practical school of Constitutional Law that the world has ever seen.

Their allotted task was to create a National Government which should reach, for its own proper purposes, by its own power, every man and every foot of territory in the whole United States, and should at the same time leave untouched and undiminished the complete control by each State of all its internal and domestic affairs; which should be entirely adequate, without aid from the States, to govern the people effectively in all matters that involved the general interests of all, to deal with foreign nations with the whole power and resources of the entire people behind it, in all the exigencies of peace and war, and to accomplish all this with the least possible vesting of arbitrary power in any department or officer of the new Government.

Distrust of Arbitrary Power.—They differed in opinion and sentiment on many points, but all agreed in a supreme dread of arbitrary power, whether it should be exercised by the executive, the legislative, or the judiciary department, whether by a single man, or by a majority of all, for they considered that the majority without any restrictions upon its power might become quite as dangerous as any other despot. They did not believe with my Lord Coke that absolute despotic power must in all governments reside somewhere. They carried this distrust of arbitrary power so far that they actually tied the hands of the people, whom they regarded as the source of all political power, and deprived them of the right to consider any amendment of the Constitution until it should be proposed by a vote of two-thirds of both Houses of Congress, or by a Convention called by Congress, on the application of the Legislatures of two-thirds of the States, and deprived them of the power of voting directly upon any amendment, which could only be ratified by the Legislatures or Conventions of three-fourths of the States.

In other words, the people of the United States who ordained the Constitution deprived themselves of the power to modify it by the direct vote of a majority or two-thirds or even three-quarters of their own number, whether that number should be three millions or eighty millions. They must act deliberately and indirectly through Congresses, Legislatures, and Conventions. Truly a rare instance of political self-restraint at the basis of free popular government.

One of the best definitions of the objects of such government is contained in the preamble of the Constitution:—

We, the People of the United States, in order to form a more perfect Union, establish Justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

The Federal Judiciary and the Supreme Court.—It was to "establish justice" for the people of the United States that the Federal judiciary, with the Supreme Court as its head, was created. It forms the balance-wheel by which the affairs of the nation and its relation to the States are kept in working order, and is itself held in check by the power of the President to appoint its members as vacancies may occur, and by the power of Congress to impeach them for misconduct, to regulate the measure of its appellate jurisdiction, and to increase or diminish its numbers. The permanent stability of the judicial power is assured by its being embedded in the Constitution, with a jurisdiction co-ordinate with that of the executive and legislative departments, by the extreme difficulty in the way of any amendment that would impair it, and by the universal conviction which the experience of a century has produced, that its continued existence with the full enjoyment of its present function is absolutely essential to the successful working of our scheme of popular representative government.

The great achievement of the framers of the Constitution was so to distribute the powers of government between the States and the nation, as to give the latter supreme control over all subjects that concerned the general interests of all, and reserve to each of the former exclusive control over local affairs which concerned only its own territory and people, and to do this in such a way that the State and Federal Administrations should not clash in actual operation.

They knew well the importance of a distribution of the powers of government between the three great departments. They created a Congress on which they conferred legislative powers over eighteen enumerated subjects, necessarily involving the general interests of the people of all the States and essential to national sovereignty, including the levying and collection of taxes for Federal purposes, the borrowing of money, the regulation of commerce with foreign nations and among the several States, the coining of money, declaring war, raising and supporting armies, and maintaining a navy.

They placed such limits upon the exercise by Congress of legislative power as should prevent its interference with legitimate local administration by the States, or with the fundamental rights of the citizens, and put such prohibitions upon the legislative power of the States as should prevent their interference with the general powers and functions of the Federal Government.

They vested the executive power of the Federal Government in the President, who was made Commander-in-Chief of the Army and Navy and

of the Militia of the States when called into the service of the United States. He was granted power to pardon offenders against the United States, to make treaties, provided two-thirds of the Senate concur, to have a veto power over Acts of Congress, which could be overridden only by a vote of two-thirds on reconsideration. He was also to nominate, with the advice and consent of the Senate, ambassadors, judges, and all the principal officers of the United States, to recommend to the consideration of Congress such measures as he should judge necessary and proper, to commission all officers of the United States, and to take care that the laws should be faithfully executed.

And, finally, to secure the absolute supremacy of the Federal Government over all matters of Federal cognisance, it was expressly provided that "this Constitution and the laws of the United States which shall be passed in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." This making the Federal Constitution and treaties made, and laws of Congress passed under its authority, the supreme law of the land is the key of our dual system of Government, as the omnipotence of Parliament is the key of the British Constitution. But the Federal Government, though supreme within the limits prescribed, is not omnipotent; it must keep within those limits.

By the 10th Amendment, passed immediately after the adoption of the Constitution, to prevent Congress from meddling with the domestic concerns of the States, or exercising powers not granted to them, it was expressly provided that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Thus the people of the United States created for themselves two separate and distinct Governments, each "of the people, by the people, and for the people," each independent and exclusive of the other within its own scope and sphere, and each able, without aid from the other, to reach for its own purposes, by its own authority, every person and every foot of land within its territory. Complex as it may appear to people living under other forms of government, this dual system has worked very simply, smoothly, and harmoniously from the beginning until now, except for the single occasion when the terrible question of slavery proved to be too much for all the departments of Government combined, and could only be settled by our long years of Civil War.

The Supreme Court as Regulator in the Constitution.—But how has this marvellous result been accomplished? How has it been possible for these two Governments, each of prescribed and limited powers, and each department of both similarly defined, to act independently and at the same time harmoniously over the same people? By what magical force has

each power, State and Federal, been kept within its own limits? What has prevented constant and hopeless conflict between State functions and officials, and Federal functions and officials, between State and nation, and between State and State, originally thirteen in number and now forty-five? How has it been possible to secure the due protection of the law to the citizens of one State in each of the other States, and the rights of aliens against local prejudice and discrimination in any State, and how has the faith of treaties been preserved in every locality?

These, and a thousand other similar questions and doubts as to the successful working of our system, are answered by pointing to the Supreme Court created by the Constitution, and to the Federal Courts inferior to it created by Congress, in which the judicial power of the United States is vested, a power which, as I have said, is co-ordinate and co-extensive with the executive and legislative. Over whatever region Congress may attempt to legislate, or the President to execute its laws, there the judicial power extends, to pass, if need be, upon the legality of their acts and the validity of their laws. The Constitution, and each of its provisions, is supreme over President, Congress, Courts, and States, and the valid laws of Congress, and treaties made under the authority of the United States, are the supreme law of the land for all its people, and for the Courts, Legislatures, and Governors of each State.

The Supreme Court as Interpreter of the Constitution.—The Supreme Court is the final judge of the validity of all laws passed by Congress or by the Legislatures of each of the forty-five States, when brought to the test of the Constitution of the United States, and of the legality of all official acts when brought to the same test. It and the Federal Courts inferior to it furnish the vehicle by which the judicial power of the United States is carried into the whole of its vast territory, to administer justice within the limits prescribed to it, to enforce the Federal laws and to punish offenders against them.

The third Article of the Constitution is marvellously brief and simple. The judges, according to that good old rule which has worked so well in England since the days of William and Mary, are to hold their offices during good behaviour, and can only be removed by impeachment, and their compensation shall not be diminished during their continuance in office. The Supreme Court has original jurisdiction only in cases affecting ambassadors, public ministers, and consuls, and in those in which a State shall be a party. The first branch of this original power has seldom been invoked, but over and over again a great State has been brought to its bar by another State to settle boundary disputes, always the most dangerous to the peace of adjoining States, and in each instance its decree has been submitted to with implicit obedience—a most unique judicial power, and a most convincing example to persuade all nations to settle these most perilous questions by arbitration.

It has been well said "that the provision that the judicial power created by the people shall be the arbiter between the States themselves, in all their controversies with each other, marks the highest level ever attained in the progress of representative government."

Tocqueville says: "In the nations of Europe the Courts of Justice are only called upon to try the controversies of private individuals, but the Supreme Court of the United States summons sovereign powers to its bar."

John Stuart Mill declares it to be "the first example of what is now one of the most prominent wants of civilised society, a real international tribunal."

In all other matters the jurisdiction of the Supreme Court is only appellate. The judicial power extends only to cases as they arise between party and party, and in the Supreme Court as they come to it mostly by appeal from the inferior Federal Courts, or by writ of error to the State Courts.

The Courts of the United States exercise no supervision over, or interference with, the President or Congress, or the Legislatures of the States. They have no veto power. They do not lie in wait for Acts of Congress, to strangle them at their birth. They have no jurisdiction to pronounce any Statute, either of a State or of the United States, void because irreconcilable with the Constitution, except as they are called upon to adjudge the legal rights of litigants in actual controversies. They simply pass upon the rights of parties as they come before them, and if a provision of the Constitution, or of a Federal Statute, or a treaty is invoked for or against a right claimed or denied, they interpret the Constitution, the law, or the treaty, and determine the right.

In this way, and in this way only, if an Act of Congress or of a State Legislature is claimed to be invalid, or an official Act is claimed to be illegal under the Constitution of the United States, and the decision of that question is vital and necessary to determine the rights of the parties, they perform the ordinary duty of interpretation, and declare the validity or invalidity of the Act, and so determine the right between the parties before them in that particular case, and for no other purpose, and this may happen months or years after the enactment of the Statute.

The Duties of the Court Judicial only.—The Supreme Court will perform no duties except judicial duties. So, when in 1793 President Washington requested the opinions of the judges on the construction of the treaty with France of 1778, they declined to comply, and when an early Congress enacted that certain pension claims should be considered and passed upon by the Federal Courts, the Supreme Court upheld them in refusing to act under it, upon the ground that the power proposed to be conferred was not judicial power within the meaning of the Constitution. Nor will the Court give a hearing to a fictitious or collusive case, contrived to raise a question as to the validity of a Statute.

Keeping strictly within the limit prescribed to it of exercising only judicial power, the Federal judiciary has steadily refrained from exercising any political power, which belongs exclusively to Congress and the President, and so it has been brought into no collision with the other departments. It will not even indulge in discussions, or express opinions upon purely political questions.

All attempts, for instance, to induce it to interfere either to restrain or compel the President in the exercise of his power to see that the laws are faithfully executed have failed. In the case of foreign nations, as well as in that of the Sovereign States of the Union, the Government acknowledged by the President, or by the President and Congress, is always recognised by the Supreme Court. In all such questions as are purely political it holds itself bound by the acts of the other departments.

So the question whether and upon what conditions aliens shall be expelled or excluded from the United States, belonging to the political departments of the Government, the Court refused to express any opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over that subject. Thus it constantly sets the example to each of the other departments of the Government of minding its own business, and keeping strictly within its assigned province.

Extent of the Jurisdiction.—But, careful as the judges are to confine the exercise of the Federal judicial power to cases as they arise, that power does extend to "all cases of law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority, to all cases affecting ambassadors, other public ministers and consuls, and to all cases of admiralty and maritime jurisdiction"; and whenever any such case does come before the Supreme Court it must take cognisance of it, and it cannot shrink, and never has shrunk, from determining the question of private right so arising. It is under these clauses that its unique and peculiar function of testing the validity of State laws and Constitutions and of Federal Statutes, and the legality of the acts of State and Federal officers arises.

The remainder of the Federal judicial power depends wholly upon the character of the parties to the controversy. It extends "to controversies to which the United States shall be a party." This enables the Federal Courts to enforce the Acts of Congress, civil and criminal, against all persons within the realm; "to controversies between two or more States," the purpose of which I have already indicated, as making the Supreme Court the arbitrator and peacemaker between Sovereign States; to "controversies between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects." It was wisely concluded that in all

such cases justice would be safer and surer, against State or local interest, prejudice or passion, in Courts representing and vested with the authority of the whole nation, than in the Courts of the State of an interested party, and that foreigners especially should have the right to have their causes heard and decided by national tribunals.

Citizenship and the Jurisdiction.—These clauses, which make jurisdiction dependent upon the citizenship or character of the parties, have been a prolific source of litigation in the Federal Courts, have opened to them the entire field of law and equity, have extended their adjudications to the whole body of jurisprudence, and have given to the decisions of the Supreme Court, by reason of the weight and force of character of the Court and its members, a commanding authority with the State Courts, and persuasive influence with foreign tribunals. But in this department of its functions the Supreme Court does not differ, in the scope of its powers and duties, from the Courts of last resort of other nations, and its distinctive and peculiar character is not involved.

The power of the Court to declare State and Federal Statutes, and the acts of the national and State executive officers invalid, as being in violation of the Constitution of the United States, naturally attracts the attention of foreign observers.

In the 112 years of its existence the Court has pronounced twenty-one Acts of Congress and more than two hundred State Statutes to be in conflict with the Federal Constitution, and therefore invalid, and in each instance there has been complete and peaceful acquiescence in the decision. So that instead of being a disturbing element, the exercise of this power confirms the peaceful relations between the States and the nation, and between the States as among themselves, protects foreign nations from the breach of treaties, and conserves the rights of property and contract, and the fundamental rights of personal liberty.

I may not, perhaps, do better than to give you several examples of the exercise of this wholesome, beneficial, and altogether conservative power.

Laws Impairing the Obligation of Contracts.—The Constitution provides that "no State shall pass any law impairing the obligation of contracts," and the aid of the Court has often been invoked for protection against the attempts of State to violate this prohibition.

The framers of the Constitution believed, and the people of the United States, in view of the successful operation of this prohibition for more than a century, believe that the States ought not to be permitted to intervene between the parties to a contract, to destroy or impair the binding force of terms by which they have agreed to be bound, and that such intervention is contrary to the principles of popular government.

It is true that in the days that tried men's souls before the adoption of the Federal Constitution many attempts had been made by States to intervene for this purpose, which doubtless led to the adoption of this clause.

Mr. Hamilton, in the *Federalist* classing such laws with Bills of Attainder and *Ex post facto* laws, which are prohibited by the same clause, says :—

> Laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation. They are prohibited by the spirit and scope of the State Constitutions. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be admitted. Very properly, therefore, have the Convention added this constitutional bulwark in favour of personal security and private rights. And I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences in cases affecting personal rights become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of Society.

The Dartmouth College Case.—In the celebrated Dartmouth College case the protection of this clause was invoked by the trustees of the College, to recover its property from a person who held it for new trustees under the authority of a law of the State of New Hampshire.

In 1769 King George III. by Royal Charter incorporated twelve persons, therein named as "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorising the Trustees who were to govern the College to fill up all vacancies which may be created in their own body. The application by the founder, who had already established the College, was for a Charter to incorporate a religious and literary institution, and stated that large contributions had been made for the object, which would be conferred upon the corporation as soon as it was created, and on the faith of the Charter the property was conveyed to it. After the revolution, in 1816, the Legislature of New Hampshire passed an Act increasing the number of Trustees to twenty-one, giving the appointment of the additional members to the Governor of the State, and creating a Board of Overseers with power to inspect and control the most important acts of the trustees.

Admitting that the provision of the Constitution embraced only contracts which respect property or some object of value, and which confer rights which may be asserted in a Court of Justice, and did not refer to grants of political power or to acts creating institutions to be employed in the administration of Government or of public property, or in which the State as a Government was alone interested, the Court after most mature con-

sideration reached the conclusion that the Charter was a contract which secured to the trustees the property and control of the College—a contract made upon valuable consideration—for the security and disposition of property, and on the faith of which real and personal property had been conveyed to the institution, and therefore a contract the obligation of which could not be impaired without a violation of the Constitution of the United States.

It held that the Statute of New Hampshire did impair it, and was therefore void, and rendered judgment restoring the property and control of the College to the trustees who represented the founder. The opinions of Chief Justice Marshall and Judge Story are masterpieces of judicial reasoning, and the principles laid down by them have ever since prevailed. In fifty-six cases decided by the Court, Acts of State Legislatures have been declared invalid in accordance with these principles, because they impaired the obligation of contracts, and it is not too much to say that, instead of having a disturbing or disintegrating effect upon civil society, these decisions have done more than any other single cause to inculcate a reverence for the law, and for the sanctity of the right of private property which is one of the chief objects of free government.

It is true that the constitutional prohibition against laws impairing the obligation of contracts does not expressly apply also to Congress. In the Convention Mr. Gerry, a prominent delegate from Massachusetts, made a motion that Congress ought to be laid under the like prohibition, but found no seconder. But in the amendments which were proposed by Congress at its first session, almost as conditions on which many of the States had adopted it and which were quickly ratified, other restraints were laid upon Congress which had the like effect. It was expressly declared that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation, and Congress is bound by these prohibitions. No matter what the emergency, it cannot violate these fundamental principles of personal rights.

Private Rights and the United States.—The Court has held that the United States cannot, any more than a State, interfere with private rights except for legitimate governmental purposes, that they are as much bound by their contracts as are individuals, that if they repudiate their obligations it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State, a municipality, or a citizen.

But strict and earnest as the Court has been in enforcing this constitutional prohibition against laws impairing the obligation of contracts, it has been ready to recognise and give full force and effect to the Statutes of other nations which imposed no such prohibition on the law-making power.

The Canada Southern Railway Company, under its Charter granted by

the Dominion of Canada, had issued its bonds at a high rate of interest, and had sold them in New York to citizens of the United States, but getting into difficulties the company devised a scheme of arrangement, which was enacted by the Dominion Parliament, by which the interest on the bonds outstanding was scaled down to a lower rate without the consent of the bondholders—a clear case of impairing the obligation of a contract. The bondholders appealed to the Supreme Court, which held that the Arrangement Act was valid in Canada, and bound non-assenting bondholders there by force of the scheme; that as it did have that effect in Canada, the Courts of the United States should give it the same effect, even as against citizens of the United States whose rights accrued in the United States before its passage; that there is no constitutional prohibition in Canada against the passing of laws impairing the obligation of contracts, and that, under these circumstances, the true spirit of international comity required that schemes of this character, legalised at home, should be recognised in other countries.

Commerce with Foreign Nations.—The clause of the Constitution giving Congress the power to regulate commerce with foreign nations, and between the States, has been another fruitful source of business in the Supreme Court in the way of testing the validity of State laws.

At the outset of steam navigation, the State of New York undertook to reward Robert Fulton for his invention and enterprise by an Act giving him the monopoly of navigating by fire or steam all the waters within the jurisdiction of the State. Under this Act the assignee of Fulton had commenced running a line of boats between certain ports of New Jersey and New York, and obtained from the State Courts of New York an injunction to restrain the owners of an opposition line of boats, put on between the same ports, from entering the waters of New York State with their boats. But the Supreme Court held, upon appeal, that the New York enactment was in conflict with the power of Congress to regulate commerce, and with its Acts in relation to commerce, and upon this ground vacated the injunction and established the right of all vessels to enter the port of New York under the authority of Congress. It was held that by virtue of the constitutional clause referred to Congress had exclusive authority to regulate commerce in all its forms in all the navigable waters of the United States, their bays, rivers, and harbours, and to make navigation free to all without any restraint or interference from any State Legislature.

By a long series of decisions that followed under the commerce clause the Court, with inflexible firmness and far-reaching sagacity, established the absolute supremacy of the nation over the whole subject of commerce, navigation, travel, and intercourse between the States, which went far to strengthen the power of the Union. At the same time they secured to the citizens of every State the full enjoyment of the privileges and immunities of citizens in all the other States, and also that absolute freedom of internal

trade throughout the country which has so vastly promoted the prosperity of the people.

Treaties.—The influence of the Court in maintaining the faith of treaties has been powerful and far-reaching. By the Treaty of Peace with Great Britain in 1783, it was agreed that British creditors should "meet with no lawful impediments" in the collection of their claims; and the Constitution said that treaties, like laws, made under its authority, should be the supreme law of the land. Various attempts had been made by several States, before the adoption of the Constitution, to impede or prevent the collection of such claims. The subject provoked bitter and exciting controversies, but the Court, against the contention of John Marshall himself, then at the Bar, held that the treaty was supreme, and equal in its effect to the Constitution itself, in overruling all State laws upon the subject, and that its words were strong as the wit of man could devise to override all obstacles directed against the recovery of such debts. Of course, any such law passed by a State after the treaty contrary to its terms would be void.

The Income Tax Case.—Perhaps the most striking illustration of the power of the Court to declare Acts of Congress itself invalid, as contrary to the Constitution, was the celebrated Income Tax case. Congress in 1894 had passed a General Revenue Law, certain sections of which imposed an income tax upon all incomes exceeding a certain amount named. This tax was levied indiscriminately upon all incomes alike, from whatever source derived, whether from the rents of real estate, the income of invested personal property, or from earnings. But the Constitution had ordained that direct taxes should be apportioned among the several States according to the numbers of their respective populations, in contradistinction to duties, imposts, and excises, which should be uniform throughout the United States.

It was contended by those who challenged the validity of the law that taxes on rent, and taxes on the income derived from invested personal property, were direct taxes within the meaning of the Constitution, and that instead of being levied uniformly, man for man, throughout the United States, they should have been apportioned among the several States according to population. The difference was very considerable and substantial. The effect of the Act, if sustained, would be to throw the principal burden of the tax upon a few large States, in which the relative proportion of wealth was in excess of the relative proportion of population, and to exempt the other States proportionally from their constitutional share of the tax. The opponents of the income tax also insisted that any inequality, which should arise from its being apportioned among the States according to population, was an inequality contemplated by the framers of the Constitution, and was intended to prevent an attack upon accumulated property by mere force of numbers.

The Court, against vehement and powerful opposition at the Bar, and from a formidable minority of the members of the Court itself, took this

view, and declared the tax to have been laid unconstitutionally, so far as it affected incomes from rents and from invested personal property. And as the invalid portions constituted so large a proportion of the whole income tax levied by the Act, that Congress could not be deemed to have intended to impose the rest without them, it further adjudged that all the income tax provisions of the Act, which constituted a single and entire scheme, must be held void.

There were some popular protests against the decision, and direful prophecies that it would disable the nation in future emergencies from raising the revenue it needed, but no such results have yet appeared. Congress, in its subsequent enactments, has conformed to the decision, and when the war with Spain came on, and an immensely enlarged revenue was needed at once, it found no difficulty in imposing taxes constitutionally and so successfully that, the year after the war closed, the Treasury was found to be burdened with so great a surplus that the entire body of war taxes had to be repealed at once.

The same case contains a fine illustration of the power of the Court to protect the States, in the exercise of their legitimate power to manage their own affairs, from interference by the Federal Government. The income tax was levied also upon income derived from the interest upon bonds issued by municipal corporations, which were but civil divisions of the States, and the Court held that as a tax upon the income of municipal bonds tended to cripple the power of the local authorities to raise money for the purposes of local government, it was not within the power of the Federal Government to impose it, any more than it would be constitutional for the States to impair the power of the Federal Government to raise money for Federal purposes by taxing its bonds.

The Abolition of Slavery and the Privileges of Citizens.—By the adoption of the 14th Amendment, to meet the conditions resulting from the abolition of slavery at the close of the Civil War, new restraints were imposed upon the States, the consideration of which has largely occupied the attention of the Supreme Court.

It provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Doubtless this amendment was primarily intended for the protection of the newly emancipated slaves, especially in the States where they had so long been held in bondage, but in its language there is no distinction of race or colour, and the Court held that it could make no such distinction in its application, which must be made alike to all cases and subjects that came within the scope of its language in its natural meaning.

It must not be thought, however, from these numerous restraints imposed

by the Constitution upon the power of the States, and the very considerable number of cases (exceeding two hundred in all) in which the Supreme Court has pronounced their Statutes invalid, that the Court is biassed against the States, or inclined unduly to enforce the limits imposed upon them. On the contrary, it has been quite as jealous and careful to uphold and maintain the reserved rights of the States in all matters of local and domestic concern, and to protect them from violation by the Federal Government, as it has been to maintain the exclusive province of Congress in national concerns against intrusion by the State Legislatures.

The Court and the Balance of Inter-State Power.—It has endeavoured, with success, to maintain the just and exact balance of power between them as prescribed by the Constitution. As against the two hundred cases in which State laws have been invalidated by its judgments, vastly more numerous cases will be found, in its reports, in which State laws have been maintained by it against attack on the ground that they involved a violation of the Federal restraints. If, then, it be asked, Why has it only pronounced twenty-one Acts of Congress invalid on constitutional grounds, while two hundred State laws have been condemned? the answer is that there are forty-five States and only one Congress, and that the members and committees of Congress are much more familiar with the Federal Constitution than those of a State Legislature, who naturally look first to that of their own State. It is notable, too, that the legislators of some States must be much more studious of the Federal Constitution than others, for while Louisiana, which became a State in 1812, and from its French origin has retained the Civil Law instead of the Common Law, has had twenty of its laws pronounced invalid for violation of the Constitution, Massachusetts, one of the original thirteen States, has only suffered twice in this way in her whole history.

Congress is, of course, in the first instance the judge of the constitutionality of its own Acts, and its members, being mostly lawyers, are familiar with the letter and spirit of the Constitution. The cardinal and wholesome rule of the Court has been, not to pronounce either a State or Federal law invalid on constitutional grounds unless the violation is clearly established, that the presumption is in favour of the validity of a Statute, and that this continues until the contrary is shown beyond a rational doubt.

The Supreme Court has felt that one branch of the Government cannot encroach on the domain of another without danger, and that the safety of our institutions depends in no small degree on a strict observance of this salutary rule. It speaks volumes for the wisdom and caution of the Court which is vested with this remarkable and fascinating power, that in so great a mass of State legislation, some of it crude and undigested, consisting of thousands of volumes, it has not found it necessary to exercise the power much more frequently.

Elasticity of the Constitution and Court.—It has been a source of frequent wonder to foreign observers that a written Constitution, which was framed

in the eighteenth century for thirteen feeble States, with three millions of people of substantially uniform wealth or property, scattered along the Atlantic seaboard, and for whose government it was regarded as a precarious experiment, should be found to answer as well in the twentieth century for the needs of a great nation of eighty millions in forty-five States, occupying the breadth of the continent, with gigantic accumulations of individual and corporate property, with conflicting interests and sentiments, and wide differences of social condition.

There was much debate in the discussions which resulted in the adoption of the Constitution, whether the Government which it called into being could reach and control even a people that was expected to occupy the territory which the Treaty of Peace of 1783 secured to the United States, which extended only from the Atlantic to the Mississippi River, and from the lakes to the northern boundary of Florida. Since that time our territory has expanded more than four times, and now embraces insular possessions of vast extent, at enormous distance from the seat of Government and half-way round the globe.

The fundamental difficulties of time and space have been overcome by the triumphs of steam and electricity, wholly unforeseen and unexpected in 1787, but which now, in the case of the United States and Great Britain alike, have rendered possible the administration of Government from London or from Washington on any portion of the earth's surface. At the time of the adoption of our Constitution it took about as long to travel the length or breadth of the then United States as it does now to go from New York to Manila, or from London to Pekin, and orders of either Government which then would have taken months to transmit, now reach their destination so as to be put in execution at the other end of the world in a few hours, and sometimes in a few minutes.

But in our case, we can account for the fact that a written Constitution, instead of being torn asunder and left by the way as the nation expanded, as new and wholly unexpected conditions arose, has grown with the growth of the nation, like the hide of an animal from its birth to its maturity, so that it still embraces and covers the whole of our vast national life. We owe it, first, to the wisdom of its framers, who inserted in it only fundamental rules and principles, generally and briefly expressed, leaving it always to Congress to fill in and provide for all details; and, secondly, to the vigorous and masterly manner in which the Supreme Court has exercised its essential and lawful function of construction. By this it has applied the whole instrument and each of its parts to new conditions as they arose, and has developed and strongly asserted the inherent powers of sovereignty intended to be vested in the Government of the United States, and necessarily resulting from their existence as a nation. It was our happy fortune that for thirty-four years, in that critical period of our history which was to determine whether we were to be a great and powerful nation, adequate

for all the needs of a first-class Power in the world, or only a league of States like the old Confederation, we had the benefit of the broad and robust intellect of Chief Justice Marshall, to enforce the liberal principles of construction which the genius of Hamilton had laid down.

The Theory on which the Court Administers the Constitution.—In a single paragraph he states the whole theory upon which the Court has administered the Constitution, and fitted it to the growing wants and changing conditions of the nation :—

> The Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist. The powers of the Government are limited, and its powers are not to be transcended. But the sound construction of the Constitution must allow to the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in a manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional.

Hamilton, in the *Federalist*, declared that "the judiciary is beyond comparison the weakest of the three departments of power ; that it can never attack with success either of the other two ; and that all possible care is requisite to enable it to defend itself against their attacks." Montesquieu, whose works, with Blackstone's, were the text-books of constitutional liberty which the framers had constantly in hand, declared that "the judicial power is next to nothing." And it was said by another French publicist, "It has no guards, palaces, or treasures, no arms but truth and wisdom, and no splendour but the justice and publicity of its judgments." But the Supreme Court, sustained generally by the confidence and affection of the people, has more than held its own. Keeping carefully within its own limits, it has for the most part laboured to keep the other departments of Government within theirs, and the powers of the States and of the nation from coming into conflict. In its hands the judicial power has been the force of gravitation which has kept each member of our federal system in its proper orbit, and maintained the essential harmony of the whole.

The Court the Guardian of the Constitution.—The closing scene in the Federal Convention, which made the Court in a way the guardian of the Constitution, will be ever memorable. After months of discussion, sometimes violent, more than once approaching the very brink of dissolution, in hopeless despair of coming to any agreement, at last the grand triumph of compromise and mutual concession was accomplished, and the members met to affix their names to the instrument. Hamilton, one of the youngest, acted as

scribe, and after Washington had signed first as "President and Deputy from Virginia," inscribed on the great sheet of parchment the name of each State, as the delegates came forward in geographical order to add their names. When all had signed, Franklin, the oldest and most famous of them all, pointing to the sun emblazoned behind the chair in which Washington had presided through the whole struggle, said to those about him: "In the vicissitudes of hope and fear, I was not able to tell whether it was rising or setting. Now, I know that it is the rising sun." After more than a century's trial of their work, the sun which Franklin saw is not yet near the zenith. Much has been done, but vastly more remains to be accomplished, and it is still morning with our young Republic.

A vote of thanks to Mr. Choate for his address was then proposed.

Mr. Bryce, in seconding, said [1] they had heard on a constitutional topic of the highest interest a lucid and instructive discourse from the man who in these islands was best qualified to deal with it. Mr. Choate had paid a well-deserved tribute to the admirable work done for the evolution of the Federal Constitution and the smooth working of the Federal Government by the great men who had sat in the Supreme Court, the greatest of whom was Chief Justice Marshall. There were two features of English polity which had passed over into America, and which had done much to enable the Federal Courts to discharge their functions worthily and to secure for the Federal Government its stability. One of these was the fundamental principle of English law that no official person, exercising any executive power, nor anybody exercising legislative delegated power, could do any act in excess of the power granted to him or it. As the Courts were the proper authority to determine the extent of power granted, it became their duty, in interpreting the terms of the grant of power made by the Constitution, to declare from time to time that the act done had been in excess of the power delegated, and was therefore null and void. This principle, familiar and obvious as it is to us, was practically confined in its political applications to countries living by English Common Law, and was not applied in countries whose jurisprudence was based on that of Rome. In all the countries of the European Continent and in their colonies great latitude was allowed to official persons and legislative bodies; with us and in the United States the official is just as amenable to the law as is any private person. The other feature was the part played both here and in the United States by public opinion. Mr. Choate had contrasted the legal omnipotence of the British Parliament, with its House of Commons elected practically by manhood suffrage, with the limited powers of the American Congress, which could not alter the smallest provision of the Constitution. Yet Congress might, as the Ambassador had observed, increase the number of the judges in the Court which interprets the Constitution, and so, in collusion with a President

[1] Mr. Bryce has kindly revised for the Society the text of his speech on this occasion.

appointing new judges known to hold a particular opinion, might so alter the Court as to obtain from it an opinion which would practically change the sound provision of the Constitution. What prevented this? The public opinion of the nation, which would condemn any such pernicious action. Just as in Great Britain public opinion restrained possible aberrations of our omnipotent Parliament, so in the United States public opinion checked and forbade any attempts to tamper with the Constitution. Fortunately in both countries public opinion was a moderating force, cautious, temperate, unwilling to disturb settled institutions, especially those whose function it was to declare and administer the law.

THE CABINET AND THE EMPIRE.[1]

[*Contributed by the* RIGHT HON. R. B. HALDANE, K.C., M.P.]

The Danger of "Forcing" Growth.—The year 1903 has already witnessed a change in the centre of gravity of public interest in Great Britain. The close of the South African war and the emergence of concern about the national finances have tended, in a very considerable measure, to divert public attention from topics bearing upon the Constitution of the Empire. I am not sure that this circumstance ought to be looked upon as an evil, even by those who are interested in such matters more keenly than in any others. There was prevalent till lately a disposition to force the pace, which was, in reality, more perilous than little Englandism. The Constitution of the Empire resembles, not a machine, but a living and growing organism, and it is not possible to force the rate of growth of such an organism without danger of weakening its springs of life. The years from 1899 to 1902 witnessed a real development. The danger was that people should take steps to try to compel the years immediately succeeding to witness growth at no less a rate. The special environment had ceased to exist, and the blue-book which recorded the proceedings at the Colonial Premiers' Conference contained a note of warning. Very slight mistakes might seriously affect the health of the body politic. It is the plan of a wise guardian not to exhibit stimulants, but rather to remove obstacles to the work of Nature herself. The Colonies display no undue hurry about assuming what some people regard as their just share of the burden of Empire. It is neither our right nor our interest to press them in the direction of contribution, or even that more rigid connection with the Imperial Government which would make increased contribution inevitable. It is not so that either the burden or the benefit will be more evenly distributed. The distribution, if it comes, will be the result, not of sudden change, but of growth, and for growth a little rest is desirable, particularly after strenuous days. Mistakes, even such as are slight, cannot always be remedied.

> The little more, and how much it is;
> The little less, and what worlds away.

[1] A Paper read at a Meeting of the Royal Colonial Institute, on Tuesday, June 9th, 1903, and published by the kind permission of the *British Empire League Journal*.

The end of the eighteenth century left us some lessons which we do well not to forget.

But if the times be of necessity quieter, they are not of necessity times of inaction. The vigorous administration of Mr. Chamberlain and the driving power which he has exhibited have changed the situation in material points. The body corporate has developed, and it is obvious that its clothes are going to need alteration. The recent war has shown that in times of emergency the self-governing Colonies are all capable of furnishing a formidable addition to the fighting strength of the Mother Country, and that they are as willing to do this as they are capable of doing it. While two-thirds of our external trade is still trade with foreign nations, our dealings with the distant parts of the dominions of the Crown constitute an increasing proportion of the whole. The bond of identity of interest and of sentiment between the various parts of Greater Britain is more than ever before manifest. Such developments as the last three years have seen cannot but bring with them fresh changes, gradual though they may be, in the ever-changing forms of the Constitution, and it is the business of our statesmen to make such preparations as will allow the necessary modifications to take place with a minimum of friction.

The King in Council.—By the theory of the State the King who governs is not merely the individual who reigns. In the business of government he acts only in Council, and his councillors are different in different departments of his business. Wherever that Government is local, and also what is called responsible, the type of the British Constitution is reproduced, and the Crown is guided in its action by ministers who are dependent on the electorate of the particular region, and are practically selected by it. As the consequence of this fact, in proportion as the self-governing dominions of the Crown outside the United Kingdom have increased in importance, the practical supremacy of the Imperial Parliament has diminished. Legally that Parliament is omnipotent, constitutionally it is not so; and even the electors in the constituencies of the United Kingdom are steadily becoming more and more disposed to recognise the necessity of what has generally been called "continuity" in the principles on which the legal supremacy of the Crown over the Empire is to be exercised. What the word "continuity" really means is that the Imperial Parliament has become aware that constitutionally it can be no more than trustee of a large portion of its legal sovereignty. In practice this sovereignty, so far as it exclusively relates to the affairs of a particular Colony, rests with the electorate of that Colony, and the Imperial Cabinet, in advising the King in this exercise of his powers in such matters, must regard itself as bound, not by opinion here, but by the wishes of the Colony. If Canada, for instance, desired to abolish the right of the King in Council to hear appeals from its Supreme Court, the Imperial Cabinet could not to-day constitutionally advise him to withhold his assent from a measure which, so far as Canada was concerned, touched

the Royal prerogative. Within certain limits the Colonial Secretary might negotiate, but he could not suggest veto.

The situation has thus become not only more complicated, but more delicate than it was even a quarter of a century ago, and it is not surprising that many minds should be at work on the problem of how to devise new forms under which adjustment may take place more easily than under constitutional forms which grew up in past generations. There is a mass of business which touches not only individual Colonies, but groups of Colonies, and even the Colonies and dependencies of the Crown as a whole and in their relation to the United Kingdom. In this region it has been felt that closer and more frequent councils are essential if effect is to be freely given to the doctrine of Imperial trusteeship. The developments of events during Mr. Chamberlain's tenure of office have led to considerable progress under that vigorous and effective administrator. Conferences are now to be held in London every four years, certain kinds of treaties are to be communicated early to the colonial Governments, and certain of these Governments, in their turn, are to propose to their Parliaments an increase in contribution towards the cost of the local naval squadrons. These new features are more important than they seem. They are the imperfect expression of a development, of a tendency to recognise and co-operate in giving effect to purposes held in common by the various co-ordinated groups of his Majesty's advisers. They have emerged into distinctness with difficulty because the legal theory clashes with the practical and constitutional truth. If the Colonies chose to find more money for Imperial purposes, such as that of defence, these features would emerge still more markedly. As it is, the situation can hardly remain where it does. A further adjustment must take place, and because it must take place organically, by a process of growth and without breach of continuity, the old forms must be adapted and used. The vice of the phrase "Imperial Federation" is that it ignores and contradicts the working hypothesis of the Imperial Constitution. It is not to some new kind of written Constitution with a new description of common Parliament that we have to look, but to gradual and cautious changes in the modes in which the Sovereign takes advice.

An Imperial Advisory Council.—Now it seems probable that there is a multitude of important but minor matters, such as deep-sea cables, merchant shipping, trade marks, copyright, the drafting of statutes, and other things of the sort, as to which much that is useful could be done by an advisory council. Such a council would be essentially a business body, and its function would be to obtain and digest information, and to give advice to the various Ministers, colonial as well as Imperial, who chose to seek it. Its importance, from a business point of view, might be very great; but it would not be a body of constitutional importance. It would have no *direct* influence in guiding the action of the Crown, and therefore it would not solve the problem of how to adapt the existing legal forms to the modern

constitutional facts. It would not bind the King to look outside the British Cabinet for advice on Imperial questions. I think the creation of such a body very desirable, but it does not appear to me to promise even the faintest success in satisfying the desire for what is miscalled "Imperial Federation." It would add a permanent element to the system of periodical conferences, and ought to lead to a development of inter-communication and mutual understanding. But the object of this paper being to consider the constitutional problem, I pass without further comment from what seems to me to be no solution of that problem.

How is it possible for a body to evolve itself which shall, from a purely Imperial standpoint, advise the King as to the use of the powers which he can exercise in Council? The Cabinet represents only the British Parliament, and is therefore only appropriate in matters which are constitutionally within the control of Parliament. For lack of any other body of advisers it goes, in its advice, beyond these matters, but it is this lack that has to be considered. It seems absurd that a change of the home Ministry taking place on some domestic issue should control the direction of Imperial policy. At present it is plain that there is no other body than the home Cabinet, and this Cabinet has therefore to regard itself as trustee of its powers. Yet there are indications that something else will presently evolve itself. It was hardly by accident that in the present year the Committee of Imperial Defence assumed a new form. This great common interest of the Empire, as a whole, is now no longer exclusively in the hands of Cabinet Ministers who go out with changes of Government. The element of continuity, that is to say, of more than British purpose, is represented by the experts who do not change, and who stand for the Empire as a whole. If the Colonies chose to contribute more largely they could indubitably claim to be represented on the Committee. Now it is true that this Committee only advises the King through the Cabinet. But it has distinctly cut, to an extent which is not the less real because it is incapable of definition beforehand, into the constitutional autonomy of the Cabinet. The power of the Committee may be in a sense small. The control of the purse remains almost entirely with the Imperial Government. But were this to change, the authority of the new body would at once increase. Indirectly the King has got a fresh source of advice which it is his duty to regard.

Its Functions and Development.—Suppose, then, that this precedent were to be followed, and another committee of advice on Imperial affairs were to be got together in the same fashion. Suppose, for example, that a committee of Privy Councillors were chosen, consisting of the Prime Minister, the Foreign and Colonial Secretaries, and certain Privy Councillors nominated by the Sovereign at the request of the Colonial Governments, as well as the home Ministers. The importance of such a body, the extent of its functions, the degree to which it limited the authority of the existing Cabinet in fashioning Imperial policy, would be simply a matter of environ-

ment and development. It might even be summoned on proper occasions to aid in the deliberations of the "King's servants," and upon these occasions would join with the members of the Cabinet in giving direct advice to the Sovereign. Its members might be given the right to speak in the House of Lords, if not in the House of Commons, and the former body might, to its own advantage, so obtain a new status as the Senate House of the Empire. In old days the same persons were not always summoned to Cabinet meetings. Whether they were or were not depended on the business, as we know from the State papers of the reigns of William III., Anne, and even the Georges.[1] The practice depends for its form on where the centre of gravity really lies. In those days it lay with the Crown, and the Parliament could not control the action of the Crown in choosing its advisers. In days that are to come it may shift, as it is tending to do already, from the British Parliament to the Parliaments of the Empire as a whole.

It seems, therefore, as though the question of whether such a change can and ought to be made were only a question of time and circumstance, and as if the situation were pretty steadily ripening for the change. Were it to be made, his Majesty would have two Cabinets, one purely Imperial, the other British. But so long as the United Kingdom retained its enormous preponderance in contribution towards the means for giving effect to Imperial policy, so long would the two Cabinets tend to remain in form one body, but somewhat differently constituted on different occasions. Beyond, in a future which may still be somewhat remote, there would lie a yet further adjustment under which the Parliaments would be, all of them, including that of the United Kingdom, as local, in the ambit of their authority, legally as they are constitutionally. Then, and not till then, would come the time for a co-ordination of the Parliaments of the Crown, and the delegation to a central and truly Imperial legislative body of those legal powers which to-day are wielded by the Parliament of the United Kingdom as trustee for the King's dominions as a whole. What most pressingly requires revision seems to be not this relation of trusteeship, which need not give place to Federation until the time is much riper for it than it appears to be at present, but the mode in which the Sovereign gets advice. In other words, it is to the executive rather than the legislative side that the would-be reformer had better, for the present at least, turn his attention. The Imperial Privy Council is a formal body which lies ready to his hand, for of this formal body the existing Cabinet is only a committee. All that seems necessary as a first step is to introduce elasticity into the composition of the committee. In considering whom he is to summon to advise him on Imperial questions, his Majesty would look beyond the mere majority in the British House of Commons, and the usage which must regulate his action in doing so would quickly mould and define itself. One of the advantages of an

[1] See the collection of cases cited by Sir William Anson, *Law and Custom of the Constitution*, Part II., pp. 110 *et seq.*, second edition.

unwritten and developing constitution is that it adjusts itself imperceptibly to what is required of it, and that it relieves us from the necessity of laying down abstract principles in advance. On the other hand, such a constitution imposes the obligation not to introduce new fashions of government before the body corporate is ready for them. Inability to interpret and act on this obligation carries with it failure. It is for statesmen to read the indications and to govern themselves accordingly.

An Imperial Court of Appeal.—I have shown you what I believe to be the true meaning and importance of the movement for the creation of the Committee of Imperial Defence. I wish to add that I think the creation in addition of an Imperial Court of Appeal in the highest degree desirable. I am not impressed with the correspondence which was published to cover the failure of the Government to deal with this matter. The true reason of the failure was, to the best of my belief, not the minor points of controversy raised by the colonial Governments, differences of a kind which could easily have been adjusted, but the unwillingness of the House of Lords to surrender to the King, in a new council or court, the appellate functions which it began to usurp from the Crown in the time of Henry IV.

Speaking for myself, I should like to give the House of Lords a new position as the Senate House of the Empire, and to transfer its appellate functions, as well as those of the Judicial Committee of the King in Council, which to-day it overshadows, to a new and great Judicial Council of the Sovereign. For this change at least the time seems to me ripe—so ripe that, if we do not bestir ourselves it may pass by, and a great opportunity for contributing to the unity of the Empire be lost. With me this point has not only been a favourite one, but is a point the neglect of which by statesmen causes me anxiety. It is easiest to make a beginning here, because there are not wanting signs that presently it may be too late to begin.

My task was to set before you considerations which have been occupying my mind as to the relationship of the Cabinet to the Empire. This I have tried to do : very imperfectly, doubtless. No one knows better than I how easy it is to pick holes in every attempt of this kind. There is only one thing easier, and that is to do nothing until it is too late to do anything. I wish statesmen would turn their minds to thinking out the whole subject and the problem that is yearly arising, definitely and with seriousness. The business is one which needs to have thinking, and a great deal of thinking, put into it, and thinking is a commodity which is in these days scarce. That the problem is not insoluble I am satisfied. I doubt whether it is even very difficult, and if the year 1903 is, as I said to you at the beginning of this address, a quiet year, the beginning of a breathing-space, that is all the more reason why our rulers should set their minds to consider what they will do when the call to action comes. For it may come with suddenness, and in a form that is unexpected.

A Federal Fiscal Policy.—So far in this paper I have confined myself to the consideration of constitutional forms. The proposition is that these should be modified so far as is necessary to make them fit the self-evolving common purposes of the Empire. Beyond the reality of these purposes changes should not go, and that is my objection to the proposal of a Federal Parliament. Such a Parliament would almost inevitably prove a fetter and a drag, and in the end lead to disruption. The silken and elastic bonds of constitutional usage are better adapted to the spirit of our people than is the iron rigidity of a written constitution. But this kind of interference with their liberty of following out the policy that suits them best is not the only kind of interference which is talked of, nor the most dangerous. People are to-day speaking of a federal system of fiscal policy as though this were an easy thing to make universally acceptable and to keep so. I entertain something more than misgiving on this topic. When it was recently suggested that we should retain the corn duty and differentiate in favour of Canada and other Colonies, I was not struck merely by the apparent unconsciousness of the extent to which this scheme would set aside economic principles which, wrongly or rightly, have deliberately been made the foundation of our trade and fiscal system. What I asked myself was whether those who threw out the suggestion so easily had really reflected on what it involved. Canada is interested in wheat. Other Colonies are not interested in wheat, but are each of them—and they are many—interested in different articles of consumption, such as beef, mutton, sugar, and wool. How are we to refuse to modify our free-trade system for these and many other articles if we concede wheat to Canada? And if we do, what of the effect on the views of our people at home, accustomed to cheap food and cheap raw materials, and competing in the foreign markets where the great bulk of our trade lies with no advantages excepting these? I am not prepared to say that the change in our fiscal system would not so gall our own people as to endanger that cause of the unity of the Empire which most of us to-day have strongly at heart. Again, what of the effect of such a change in our fiscal constitution or our position in those vast territories which, like for example Egypt, we hold to-day without murmur because it suits the rest of the world that we should hold them? No occupation excepting one on a free-trade basis would be tolerable to other nations, and we should be driven to rely for our position, as by far the greatest nation in the world in point both of territory and population, on armaments alone, instead of good-will. I cannot see far enough along the new road to make myself easy over the idea of choosing it. I know not where it would lead me. For aught I can see to the contrary, the basis of the Empire is really a free-trade basis. Let the Colonies remain at liberty to take their own course, and let us remain at liberty to follow ours. There will remain common ends, which do not entail bondage. It is not by putting fetters in place of either legal or fiscal liberty that we are likely to strengthen the only

kind of bond than can unite us. I am not in the mind to take leaps into the dark. Our own people and the people of the Colonies have both to be considered. We can best serve the Colonies by remaining as rich and strong as we can. Our strength depends on the maintenance of our national income, an income which has grown to the enormous dimensions it has under a free-trade system, and which is still growing. Whatever other explanations may or may not be possible, there is the *fact*, and again I say I am not for a leap in the dark. Geographically this country is wholly different from the United States and Germany. What may have been a proper economic or military policy for them must be judged in the light of considerations which do not apply to our island nation, that can live only by commanding the ocean with its ships and neutral markets with its products. If we are to assist the Colonies financially, direct grants in aid would surely be safer and cheaper than any such departure into the wasteful and ill-explored region of indirect taxation.

It is more than half a century since the free-trade controversy was thoroughly investigated by Peel and Gladstone and the great economic thinkers and men of business who gave them the materials from which they drew their conclusions. I should like to see the whole matter investigated once more with equal thoroughness. Until it has been, we are not likely to come to an end of the flood of loose talk upon what is a difficult and highly technical topic. Meanwhile, it is to be noted that the vast majority of the experts remain adverse.

Executive and Parliamentary Adaptation.—I return, then, to the proposition which I have already ventured to submit to you, that we do well to turn our minds to the possibility of executive rather than Parliamentary or fiscal adaptations. Here there is room for the kind of change that proceeds no faster than the movement that renders it necessary. Here reform is not likely to clash with self-interest, and the rigidity that readily becomes irksome is avoided. The constitution of the Empire is a vast field of inquiry. It requires the most careful exploration. For him who would make changes in its organisation, knowledge and great capacity to think are as necessary as the ability to act.

THE HISTORY OF COMPARATIVE JURISPRUDENCE.[1]

[*Contributed by* Sir Frederick Pollock, Bart.]

First Appearance of the Term.—The name of comparative jurisprudence is modern; our current use of the term, with the full meaning which it now bears, is barely a generation old. It seems that about, or possibly before, 1830, some one applied the name of general or comparative jurisprudence to the process of ascertaining the "principles common to maturer systems" of law, "or the various analogies obtaining between them"; the result of which process, it seems to have been supposed, would be a system of universal principles of positive law.[2] We are not now concerned to enquire what useful results we should derive from the proposed operation; I do not think any one would now maintain that a philosophy of law was likely to be among them. Whatever may be the value of the process or method thus indicated, it is not what we now call comparative jurisprudence or *droit comparé*. In the succeeding generation a learned and brilliant reviewer of the first edition of Maine's *Ancient Law*, whom I am permitted to identify as Mountague Bernard, wrote thus: "The fields of study immediately adjacent to Law are History and Ethics, each of which, indeed, may be so extended as to include a great portion of it; while law itself embraces a vast region, the domain of comparative jurisprudence, of which English Law forms a small province."[3] No further light is thrown by the context on the precise meaning to be attached to the term. The learned writer, however, fully recognised that existing legal institutions cannot be understood without some knowledge of their history, and therefore he cannot be supposed to have regarded comparative jurisprudence as a thing standing apart from historical study and discrimination. Still, its object seems to have been conceived as practice rather than knowledge, the collection of materials for useful amendment or assimilation of existing

[1] A farewell public lecture delivered in the University of Oxford on January 24th, 1903, with a few later corrections and additions.

[2] Austin's fragment *On the Uses of the Study of Jurisprudence*, written in 1834 (A. on Jurisp., ed. 1869, ii. 1107). I have not been able to discover what writer is alluded to.

[3] *Quart. Rev.*, cx. 115 (July, 1861).

laws rather than any scientific or philosophical construction. In technical terms, comparative jurisprudence was regarded wholly or mainly as a handmaid to the theory of legislation.

"Comparative" formerly treated as excluding "Historical."—About ten years later we find Sir Henry Maine himself speaking of comparative jurisprudence, in his opening lecture on Village Communities, as not having for its object to throw light upon the history of law. "What it does is to take the legal systems of two distinct societies under some one head of law—as, for example, some one kind of Contract, or the department of Husband and Wife—and to compare these chapters of the systems under consideration. It takes the heads of law which it is examining at any point of their historical development, and does not affect to discuss their history, to which it is indifferent." Maine goes on to state, as a proposition "universally admitted by competent jurists, that, if not the only function, the chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of law." The use of it is that "by the examination and comparison of laws" and methods of legal reasoning "the most valuable materials are obtained for legal improvement." He adds that the enquiry to be pursued in the following lecture—namely, the examination of the tenure of land, with its legal and economic incidents, in certain parts of India, in comparison with the history of corresponding institutions in Europe—"can only be said to belong to comparative jurisprudence, if the word 'comparative' be used as it is used in such expressions as 'comparative philology' and 'comparative mythology.'" It seems to us, at this day, difficult to understand why any one should have taken exception to such use; and in fact the analogy of comparative jurisprudence to comparative philology was clearly stated as early as 1857 by Emerico Amari, of whom I shall speak later. Maine, however, continues, in a rather apologetic tone: "I think I may venture to affirm that the comparative method, which has already been fruitful of such wonderful results, is not distinguishable in some of its applications from the historical method." It is curious to see how far the master still was, ten years after the publication of *Ancient Law*, from realising the importance of his own work. If there is anything we have learnt from Sir Henry Maine, it is that intimate alliance between comparative and historical research is not only natural and desirable, but necessary for either branch of work being efficiently done. If there is any book to which a modern teacher would point as a typical example of what is meant by comparative jurisprudence, it is this very series of lectures on Village Communities in the East and West. Maine's hesitation seems to have been a kind of expiatory offering to the ghosts of those mechanical and external conceptions of human institutions which he did so much to destroy—if indeed there can be ghosts of vain shadows that never had any life.

The modern canon of comparing institutions in parallel stages, not

necessarily contemporaneous.—No doubt the method is important and not the name. It makes no great difference whether we speak of historical jurisprudence or of comparative jurisprudence, or, as the Germans seem inclined to do, of the general history of law.[1] What does matter is understanding that comparison of institutions is profitable only when we take account of the stage of civilisation and of special development to which the terms to be compared belong. The mere order of time has next to nothing to do with it, as one or two examples will readily show.

If we compare the Roman law of property which Papinian administered at York seventeen centuries ago with the English law of real property which the Court of Appeal now administers in London, it will be for the purpose of throwing light not on anything in the past history of English law, but on what English law may tend to become in the days of our children or grandchildren; for the classical law of Rome is, in all essentials, far more modern in everything relating to the ownership and disposition of landed property than the mediæval system, eked out with cumbrous and piecemeal alterations, which still serves our turn. On the other hand, the commercial law of the Roman Empire under the Antonines and even under Justinian was archaic and rudimentary as compared with the modern development of the law merchant. Ulpian would have stared and gasped alike at a strict settlement and at a debenture payable to bearer, but for wholly different reasons. If, again, Papinian could have been transported from York to India, he would have found millions of men living under systems of family law so ancient that only faint vestiges of a corresponding stage could be found in Roman traditions and forms; and if he could now visit "Agra and Lahore of Great Mogul," he would find the same rules still being administered by English judges, having indeed suffered something of secular change, and more in some provinces than in others, but little changed on the whole in comparison with their world-wide difference from any modern Western law. To compare the institutions of Indian law and custom directly with modern English law can lead to nothing but ludicrous if not dangerous misunderstandings; as indeed happened in at least one celebrated instance.

Even in parallel comparison, history cannot be excluded.—It is true that, as Maine said, the provisions of different systems, taken at stages of development sufficiently corresponding to afford a real parallelism, can be compared, in form or on their substantial merits, without any explicit historical criticism. You cannot compare the law of the Twelve Tables as to execution against a debtor with, say, the Indian Civil Procedure Code, except by working through a great deal of intermediate history. But you can compare

[1] Die Universalrechtsgeschichte, die man auch vergleichende Rechtswissenschaft zu nennen pflegt, hat die Aufgabe, wo möglich die Rechte aller Völker zu erforschen, der lebenden wie der toten, und diese Rechte zu erforschen, nicht nur was die objektive Rechtsordnung, sondern auch was die Betätigung der Rechtsordnung im subjektiven Rechtsleben betrifft.—J. Kohler in *Encyklop. d. Rechtswissenschaft*, 6th ed. 1902, pp. 17-18.

one modern Western law of companies or of insolvent debtors with another, taking them just as they stand. Even in these cases, however, we shall not find it easy to keep out history. Suppose we are comparing the modern law of bankruptcy in France and England. We cannot help noting the fact that French law makes a sharp distinction between persons engaged and persons not engaged in trade, and English law does not; and the manner in which we account for this difference may (I do not say that it will) have some bearing on our conclusion as to the practicability or utility of assimilating the treatment of insolvent estates under the two systems. Then, if we wish to arrive at the reasons for English legislation and jurisdiction not dealing with commercial law as a thing apart, or at any rate to avoid giving wrong reasons, we may have to go back as far as the incorporation of the law merchant into the Common Law in the eighteenth century, perhaps farther. More than this, the working life of any body of law depends not merely on its authentic texts and the decisions or books that interpret them, but on complex influences of professional training, tradition, and habit of mind. We can appreciate a foreign or antiquated system only by learning to see it in its proper historical atmosphere. Do we say, then, that history is everything and comparison nothing, or that comparative enquiry is merely an application of the historical method? By no means. The merely national or provincial history of an institution is, except by the rarest accident, as little satisfying or intelligible as the anatomy of a single species or the inflexions of a single language. Many parts of English law, taken alone, present in their development what seem to be grotesque aberrations. Such is the manner in which the king's judges, at the very end of the Middle Ages, assumed, or rather accepted, jurisdiction to enforce informal promises. At first sight nothing can be more absurd in modern students' eyes than that one of the most elementary duties of civil life and business should have been left for centuries, in its purely religious or moral aspect, to the protection of the spiritual Courts, and then brought within the temporal sphere by a process hardly to be distinguished from fiction in its earlier and certainly involving fiction in its later stages.

When we turn to the antiquities of Greek and Roman legal forms, we find many traces of a period when the obligation of promises could at most be religious, and religious only. It is now accepted doctrine that the Roman *sponsio* was originally a religious ceremony creating a spiritual sanction. We find, in later times, the religious sanction of plighted faith persisting throughout Europe in the Middle Ages, whether derived from popular Roman tradition, or from an independent though similar Germanic origin, or from a conjunction of both. St. Francis not only makes the reconciled wolf give him his paw in token of faith, but repeats the ceremony (like a good man of business, for it is a vulgar error to suppose that enthusiasts are necessarily unbusinesslike) with the witness of the townsmen of Gubbio. And we see that the curious English history of *fidei læsio* and the action of *assumpsit* is

part of a normal and widespread process, though belated in time. I have taken a striking example with which I happen to be familiar, as it was in this region that I first learnt the necessity for basing any sound dogmatic theory of modern English law on knowledge of the mediæval authorities. But it must not be supposed that the example is singular. English land law cannot be understood at all without a great deal of historical explanation; it cannot be understood very well without learning how peculiar the English history of land tenure was, from the Norman Conquest onwards—in other words, without comparing the divergent fortunes of English and Continental feudalism.

Dangers of neglecting Historical Method.—As the need for both historical and comparative study is most strongly illustrated in the Common Law, so are the consequences of neglecting or underrating them. Blackstone was a respectable historical scholar according to the standard of his time, and much good history is in fact to be found in his *Commentaries*. But there are also several more or less ingenious but wholly groundless conjectures, and, especially in the earlier period, not a few downright errors; and these are, I think, always accounted for by insufficient command of the historical data. I am far from denying that shortcomings of this kind were often excusable, or even inevitable, having regard to the amount and condition of the materials available when Blackstone wrote. Departments of our law might be mentioned in which text-writers have continued, even in our own time, to repeat much less plausible fictions with much less excuse. There is, or was, a still more dangerous temptation—that of regarding comparative illustration as a matter of mere ornament, and omitting to make sure that the less familiar term of the comparison is correctly apprehended. Some of Blackstone's references to Roman law cannot be acquitted of negligence, for they involve misunderstandings of elementary doctrine from which any civilian in Doctors' Commons or at Oxford could have saved him. Warnings on this score, however, ought not to be required by serious workers at this day. The perils that now beset us are more subtle. We may be too eager to see historical affinities between rules or customs which are really the similar but independent result of similar circumstances in distant times and places. An apparent coincidence may beguile us into proclaiming that something in modern usage is a surviving fragment of prehistoric manners, without satisfying ourselves that the supposed survival, as we find it, is general or ancient, or that it has not a discoverable history which our conjecture will not fit. In our desire to have a sort of normal growth of national custom, we may fail to leave sufficient room for the disturbing influence of foreign institutions, and not only for "contamination," as the philologists call it, but for actual deliberate imitation. Errors of judgment are possible in all these ways and more, and there is no royal road for keeping clear of them. Only experience will teach us to feel an instinctive mistrust when we are entering a perilous atmosphere;

to work cautiously as miners who have to work underground; and not to deem ourselves shining lights when our lamps are glowing only with the fire-damp of rash speculation, presently to explode and be succeeded by the choke-damp of deserved oblivion.

Historical Method and the Doctrine of Evolution.—At present vindication of the historical and comparative method in law and politics may be thought superfluous. We may rather be inclined to asked why its importance was recognised so late. The fact is that the transformation of political science about forty years ago cannot be disconnected from the all but simultaneous putting forth of new and far-reaching ideas in the study of organic nature. *Ancient Law* and *The Origin of Species* were really the outcome, in different branches, of one and the same intellectual movement—that which we now associate with the word Evolution. This identity of spirit was not perceived at the time. The same organs of lettered and respectable opinion which gave Maine's work the welcome of just, though perhaps barely just, praise, were still wasting paper and ink on denunciations, as crude as they were ineffectual, of Darwin. The triumph of the constructive historical method had been assured in both natural and moral science by half a century's work of specialists almost unknown to the general public, and seldom acquainted with or interested in one another's researches; and the disclosure of the results, when the time was ripe, came like thunder from a clear sky. Ten years later the lines of thought which had seemed shocking or paradoxical were familiar; after ten years more it was hard to remember that they had ever been strange. We do not know why these things should have happened just when they did. We can say that the historical temper of the nineteenth century was due to reaction against the didactic rationalism of the eighteenth, as that rationalism, again, was provoked by the futile conflict of dogmatic claims in the wars of religion which succeeded the Reformation and lasted till near the middle of the seventeenth century. But we cannot fix more positively the causes which postponed modern historical criticism till our own time, any more than we can fix those which prevented experimental science from making any appreciable progress in the age, at first sight not wanting in favourable conditions, of Augustus or of the Antonines.

Partial Anticipations—Imitation of Foreign Laws in Antiquity.—Anticipations of comparative enquiry may certainly be found in jurisprudence as well as in other kinds of learning. Many of these were ingenious, and some important; but, so far as they consisted of observation, they were detached and merely empirical, and, so far as they were speculative, they were barren for want of continuity, having no relation with any certain doctrine or method. Some instruction can be derived from considering these earlier attempts. They will show us, at least, what a little way the most laudable curiosity without method will carry us towards scientific results, and how much better an imperfect method is than none.

Probably the earliest form of the comparative study of institutions was the observation that those of another commonwealth were in some way better than one's own, followed by deliberate imitation of them. News did not spread in the ancient world so fast as it is distributed now, but it did spread. The fame of a great legislator travelled, and lost nothing in travelling. Whether the name of Minos contains any historical element or not, we need not doubt that in the prehistoric time of which we are just beginning to learn something the superior civilisation of Crete attracted many pilgrims and ambassadors from many coasts and islands of the Mediterranean. Stories of this kind may be legendary in detail, but are not to be dismissed wholesale as mere fiction. Indeed, their general credibility is increased by the recent discovery that the introduction of writing in Europe dates much farther back than we had supposed. If laws existed in writing, they could be copied. The supposed absence of writing was one of the chief difficulties in believing adoption by less advanced communities of improvements effected in the more advanced ones to have been common in very early times; and this difficulty is now removed. The classical example of the Twelve Tables, at all events, is within historical times and not open to exception. Whether we accept the received account, or are persuaded by the learned and ingenious argument of M. Lambert of Lyons[1] that the Tables are a custumal of the second century B.C., and the decemvirs legendary characters, matters very little for the present purpose. It is certain that the Twelve Tables, whatever be their real date and original authority, show a considerable amount of borrowing from Greek sources, as the Roman antiquaries of the Empire fully recognised.

"Ius Gentium"—Roman Legal Antiquaries.—It is a more doubtful question whether the Roman *ius gentium* was formed by any process that can be fairly described as comparison or selection. We know that it sprang from the necessity of administering justice between parties to one or both of whom the law of Roman citizens was not applicable; we may safely guess that in most cases the parties had no desire to be judged according to Roman law. We do not know by any direct evidence from what materials or on what principles a common rule was constructed. But in Latin literature the name signifies generally received custom, as my late colleague, Prof. Nettleship, has shown. It seems probable that the practice of Mediterranean traders had fixed a certain amount of custom for the regulation of their business among themselves, and one would think the Roman magistrate was more likely to adopt and sanction an existing mercantile custom, when ascertained, than to invent some new rule according to his own notions of justice. Professional and scientific development of the rules thus taken into Roman jurisprudence came, as it could not but come, later. In short,

[1] In the *Revue générale du droit*, 1902–3. This hypothesis was discussed in the legal section of the Historical Congress held at Rome in April, 1903. None of the learned Romanists present—French, German, or Italian—were disposed to agree with it.

it seems reasonable to suppose that the reception of the *ius gentium* in the Roman law was not much unlike the establishment of the law merchant, many centuries later, as part of the Common Law. If these considerations are entitled to any weight, we can hardly give credit to the Prætor Peregrinus for having founded the science of comparative jurisprudence, and we may even think that deliberate comparison and selection had very little to do with the formation of the *ius gentium* at any stage.

Rudiments of both comparative and historical research occur in the works of the classical Roman lawyers. Gaius not only traces imitation of the laws of Solon in the Twelve Tables, but is curious about an alleged parallel in Galatian custom to the Roman *patria potestas*, and mentions that in early law spoil of war was regarded as the highest form of property (*maxime sua credebant esse quæ ex hostibus cepissent*)—a light on the possible origin of private ownership in movables which seems to be in the right direction. But such passages are few and desultory. Homer might now and again furnish an elegant illustration; it did not occur to any one that archaic and provincial usage, whether recorded in literature or surviving in practice, deserved any systematic study. As the forms of imperial government became more and more centralised and official, any such enquiry became still more remote from the probable scope of an educated man's pursuits. No attempt was made to increase Aristotle's collection of notes on the political institutions of many states and tribes, which would have been priceless to modern anthropologists and of great value to legal history. It does not appear that any pains were taken to preserve it. Except for the treatise on the Constitution of Athens, discovered in our own time, we know this part of Aristotle's work only by tradition.

The Middle Ages—English Writers.—The fall of the Roman Empire restored ample, and more than ample, variety to the laws and customs of Europe; but it is superfluous to point out that the accompanying condition of society was not favourable to disinterested scientific treatment of the material. When learning and speculation were painfully revived in the Middle Ages, and began to assume new forms, the general ideal of thinking men was the restoration of peace by general submission to some superior and universal authority. The champions of the Pope and of the Emperor criticised one another freely, but the criticism was altogether remote from historical investigation. People who quite honestly believe themselves to possess infallible means of knowing what ought to be will hardly spend their time on the humbler task of learning from the experience of what has been. Besides, the professional learning of both theologians and jurists was dominated by the cosmopolitan tradition of Roman law. The case of England was an exception, but exclusive devotion to the Common Law, heightened by not a little jealousy of any attempt at encroachment on the part of either canonists or civilians, was not a direct way to serious comparative enquiry. Still, it is remarkable that the nearest approaches to

comparative criticism, down to the seventeenth century, were made by Englishmen. Sir John Fortescue, when he followed his master Henry VI. into exile, considered French political and legal institutions, and recorded his reflections in his two principal works, on *The Governance of England* and *De Laudibus Legum Angliæ*. It is true that he does not at all concern himself to account for the laws or customs of the French monarchy, and compares them with those of England only to triumph over them as in every way inferior; but he does compare them.

St. German's "Doctor and Student."—In the sixteenth century Christopher St. German, a very learned lawyer, undertook a much more serious and critical piece of work, probably with a view to conciliation. The co-existence of the Common Law with the Canon Law in England had produced a considerable amount of competition for business between the lay and the spiritual Courts, besides the political conflicts which belong to general history. Not the least of the causes of the Reformation in England was the popular dislike of the Courts Christian for their minute and vexatious enforcement of moral discipline. On the other hand, by regarding breach of faith as an ecclesiastical offence, they practically acted as petty civil Courts in many cases where the Common Law, down to the latter part of the fifteenth century, did not provide any remedy. Thus the points of contact and friction between the temporal and the spiritual jurisdiction were many. St. German lived in the heat of the Reformation and wrote his well-known book, *Doctor and Student*, somewhere about 1520. It is now remembered, and is still useful, as a learned and accurate statement of the Common Law as it then stood; but it is in fact a comparative exposition of the two systems, the Doctor of Divinity and Student of the laws of England taking their turns. The general object seems to be to satisfy persons not learned in the Common Law, by detailed examples and illustration, that on the whole it is a consistent and reasonable system, and apparent contradictions of the rule of conscience as it might appear to a canonist are explicable when they are placed in their proper context. There is no historical enquiry and very little direct criticism, but there is comparison of two systems of legal ideas and rules, undertaken with a definite purpose, and conducted by an author well acquainted with both. At the beginning of the next century (1602) William Fulbecke, apparently seeking to improve on St. German's example, produced his *Parallel or Conference of the Civil Law, the Canon Law, and the Common Law of this Realm of England*. This is an ambitious attempt, covering a wider field and expressed in dialogues between several persons, whom the author adorned with such names as "Anglonomophylax" and "Codicgnostes" (*sic*). It is called a comparative discourse in the dedication of the second part to the Archbishop of Canterbury. As a whole the book is tedious, ill-constructed, and uncritical. It never acquired any serious reputation, and there is no modern edition of it. St. German's *Doctor and Student* has not only been many times republished, but is to this day counted by the

followers of the Common Law among their "books of authority." I do not think it would be any disparagement to a modern English or American lawyer's learning if he had never heard of Fulbecke.

European Thought in Seventeenth and Eighteenth Centuries—Leibniz, Montesquieu.—We now come to greater names. Leibniz, among many other schemes never completed, formed that of a universal historical and comparative survey of legislation (*theatrum legale*).[1] But he never did anything more in the matter, as, indeed, the project was too vast for any one man's lifetime. We must pass on to the eighteenth century to find the great precursor of modern historical and comparative research—I mean Montesquieu. If we hesitate to call him the founder, it is only because neither his materials nor his methods of execution were adequate to do justice to his ideas. He aimed (if I may repeat my own words, first written many years ago) at constructing a comparative theory of legislation and institutions adapted to the political needs of different forms of government, and a comparative theory of politics and law based on wide observation of the actual systems of different lands and ages. Hobbes was before him in realising that history is not a series of accidents, but Montesquieu was the first of the moderns to proclaim that a nation's institutions are part of its history, and must be considered as such if we are to understand them rightly. Much of his history is sound, and many of his judgments are admirable. Yet he failed to construct a durable system, and *L'Esprit des Lois* cannot even be called a systematic book. The materials were still too scattered and uncertain to be safely handled on Montesquieu's grand scale. Perhaps he would have done better to confine himself to Western Europe. The main defects of his method may be reduced, I think, to two. First, he overrated the influence of climate and other external conditions, and underrated, if he did not wholly neglect, the effects of race and tradition. Next, he had not even an inkling of what is now a fundamental rule of this kind of enquiry: namely, that there is a normal course of development for communities as well as for individuals, and that institutions which belong to different stages are not commensurable terms in any scientific comparison. This is as much as to say that even Montesquieu could not wholly escape from the unhistorical dogmatism of his time. It is perhaps a minor drawback that he constantly seeks for reasons of deliberate policy to account for seemingly eccentric features of outlandish customs, rightly or wrongly reported by missionaries or others, instead of endeavouring to connect them with their historic and racial surroundings. But the result is that many chapters of his great work amount,

[1] *Nova Methodus discendæ docendæque Iurisprudentiæ*, Francf. 1667, part ii. § 29, opp. ed. Dutens, iv. 191. His words are: "Ex his aliisque omnibus [the extant documents of all known systems of law] undecunque collectis, Deo dante, conficiemus aliquando *theatrum legale*, et in omnibus materiis omnium gentium, locorum, temporum placita παραλλήλως disponemus." This is only one of about thirty works to be undertaken for the improvement of legal studies.

taken by themselves, to little more than collections of anecdotes and conjectures in which the most incongruous elements, such as the customs of China and the laws of Spain, are brought together at random.[1] Also Montesquieu is not free from the very common error, especially prevalent in the eighteenth century, of attributing a constant and infallible efficacy to forms of government. In short, Montesquieu saw the promised land afar off, but was not equipped for entering it. I do not wish to be understood as affecting to find any fault with him. The greatness of Montesquieu's conception was his own, and the shortcomings in execution were at the time necessary, or at least natural.

Vico.—A great Italian thinker, Vico, wrote some twenty years earlier than Montesquieu.[2] It was both his misfortune and that of Europe that for a long time his reputation and influence were all but confined to Italy. Montesquieu, as he did not lack enemies, was accused of having made acquaintance with Vico's work before publication and used it without acknowledgment; but this seems to be mere fiction.[3] Vico must certainly be named among the precursors of historical method on a large scale. It is possible that he may yet indirectly recover his due share in European speculation through the labours of the school of Italian publicists who have been doing remarkable work of late years. With historical and comparative research, as we understand them for the present purpose, his connection is less close than Montesquieu's; though, like Montesquieu, he was led to political science by the study of law. Vico's aim was at nothing less than a universal philosophy of politics and history; the elucidation of particular problems in jurisprudence or economics by historical study was only incidental, and the use of comparative examples was not as an instrument of discovery but for the illustration of general truths already deduced on metaphysical rather than historical principles.[4] I confess that my acquaintance with Vico's work is slight; but such is my impression. Perhaps we may say that he was the pioneer in speculation, as Montesquieu in observation, of our modern scientific historians. In the faith that historical changes are not casual, but follow an order capable of rational determination when the conditions are given, these two men stood together far in advance of their generation.

Eighteenth-Century Thought not favourable to historical criticism.—At first sight it is little to the credit of Montesquieu's and Vico's con-

[1] As Amari well says (*Critica di una scienza delle legislazioni comparate*, p. 218): "Lo spirito troppo vivace nuoce sovente al vero, le osservazioni sono più spesso argute e speciose anzichè esatte: vuole porre un principio e scrive un epigramma."

[2] The first edition of the *Scienza Nuova* was published in 1725, the second in 1730; *L'Esprit de Lois*, at first anonymously, in 1748.

[3] R. Flint, Vico, Lond. 1884, p. 164.

[4] His Latin treatise, *De uno Universi Iuris principio et fine uno*, is purely dogmatic in form, though it deals with historical problems and contains many brilliant historical conjectures, anticipating, *e.g.*, Maine's doctrine as to legal fictions.

temporaries that their work was not followed up.[1] But the temper then prevalent among leaders of European thought was not propitious. The men of the French Encyclopædia were protesting against the dogmatic traditions of the Middle Ages, but their criticism was itself hardly less dogmatic. They proceeded on a generalised view of human nature which excluded allowances and qualifications, and they were as impatient as any orthodox doctor of taking lessons from history except such as they were *à priori* prepared to accept. Rationalist ethics and politics, as they had grown up in the eighteenth century, culminated in the doctrine of the English utilitarians, perhaps the most dogmatic of all systems of natural law in spite of its professed appeal to experience. Not that I am minded to disparage the services of that school. Every mode of thought has its appointed time, and the work of the Reform Bill period in England could not have been accomplished by historical criticism. As to legal science in particular, its principal task in the eighteenth century was the establishment of the law of nations on the foundations laid by Grotius. Now the method of the publicists who followed Grotius was essentially rationalising, and their aim was uniformity. Study of diversities occurring in actual history was exactly what they wanted to avoid. Vico himself put aside apparent exceptions to the universality of natural law with a certain impatience.[2] The newly constructed law of nations, an avowed offshoot of

[1] Vico had a remarkable successor in the nineteenth century, whose work was published at an unpropitious time, and seems, unfortunately, to have remained unknown outside Italy. I am indebted to learned Italian colleagues for calling my attention, at the Historical Congress at Rome, to Emerico Amari's *Critica di una scienza delle legislazioni comparate* (Genova, 1857: in Brit. Mus. library; an intended sequel dealing more fully with the historical part of the subject seems not to have been published. The only printed information I have been able to find about the author in England is in Vapereau's *Dictionnaire des Contemporains*). Amari insists from the first on the importance of combining historical with comparative study, and the insufficiency of any one system alone to provide materials for a philosophy of law or theory of legislation. He gives due weight to the imitation of foreign models as a factor in legal history, and incidentally deprecates the unthinking adoption by Italian states of the French codes with all their faults. He points out that comparative jurisprudence is not merely statistic or dogmatic, but leads to a real "biology of law," and he dwells on the analogy of comparative philology. He was well acquainted with the German historical school, and with the projects of law reformers in the principal countries of Europe; and, writing in the darkest days of Italy and in exile from his own land of Sicily, he never lost hope. One is glad to know that he lived to see better things; he returned to his native city of Palermo and died there in 1870, on September 20th, the very day when the Italian troops entered Rome. The only lacuna to be observed in his book, from our present point of view, is that nothing is said about the special study of archaic legal ideas and their survival or transformation in modern law and practice. There is much acute criticism in detail; Amari rightly sees, for example, that Bentham's system is essentially dogmatic. I have quoted one of his remarks on Montesquieu above.

[2] Vel perturbationes animorum, vel barbararum gentium absurdi mores nihil quicquam ius naturæ demutant, quod æterna demonstravimus constare ratione.—*De uno Univ. Iuris princ.* §. xlviii. This is pretty remote from the modern comparative method.

the old law of nature, had to impose itself on the governments of Europe, not only by intrinsic merit, but by the weight of uniform authority; the formulated reason of mankind was to command obedience where the Pope and the Emperor had failed. If it could not say of itself *quod semper*, it would assert the right to say *quod ubique*, *quod ab omnibus*. Any tenderness for local variation, any too curious investigation of historical progress, would have been fatal to its cosmopolitan supremacy. It is true that Grotius collected and used a great number of examples from many authors of many times and countries. But his method in using them was not what we now call historical. They were to illustrate propositions demonstrable by pure reason. From that quarter, therefore, no encouragement would come to comparative studies, in the modern sense, of either politics or law. Moreover, and more generally, people who live under antiquated institutions, and are constantly hampered by them, if not worse, are not likely to consider their origins and historical affinities with such impartial curiosity as modern science, political as well as natural, demands of its followers. It was hardly Voltaire's business to take a scholarly interest in the development of canonical procedure.

Rise and Recognition of modern scientific Methods.—Then came the great clearing storm of the French Revolution, and when Europe was at peace again, the works of peace were resumed by a new generation. It became possible to consider with sane judgment and due respect the past that was frankly past, and to treat history as a science. Modern criticism was started anew, or taken up where the precursors had left it. Yet another generation, and the results of the historical method were revealed to the educated public, as I said above, with a kind of explosion. Comparative jurisprudence, however, being versed in profane and to some extent prehistoric matter, did not pass through the stage of being denounced as perilous to religion. It suffered nothing more nearly approaching persecution than a somewhat cold and unintelligent reception from the champions of old-fashioned philosophies of law, and in England, in particular, the surviving high priests of a moribund utilitarian orthodoxy. The complete recognition of the new branch of legal science may best be dated from the year 1869. In that same year the Society of Comparative Legislation was founded in Paris,[1] and Sir Henry Maine was appointed the first Professor of Historical and Comparative Jurisprudence at Oxford. It is proper to record that the foundation of this chair by the munificence of Corpus Christi College was due in the first instance to Wilson, then President of the College, and Sir Kenelm Digby, then a Fellow. Certainly the use of the word "legislation" by the parent French Society, followed apparently for con-

[1] There was a chair of comparative law at the Collège de France as early as 1830, and another, limited to criminal law, at the Sorbonne; but Littré, writing his great dictionary of the French language about a generation later, made no mention of any such term as *droit comparé*.

formity's sake when the English Society of the like name was established so recently as 1896, argues a rather inadequate conception alike of the problems and of the method; but the work of both societies has disregarded these verbal bonds. It is impossible to give in a short compass even the most superficial account of the various applications of comparative research, within the last twenty or thirty years, both to jurisprudence proper and to allied branches of political science. For an English lawyer it is hardly too much to say that the methods which Oxford invited Maine to demonstrate in this chair have revolutionised our legal history and largely transformed our current text-books. If you desire to know what is being done by the historical and comparative method in the world of learning at large, you must enquire not of one man, but of many. I name only some scholars whom I have the privilege of knowing personally. You must ask of Esmein and Paul Viollet in Paris, of Brunner and Gierke in Berlin, of Balzani and Boni at Rome, of Kovalevsky and Vinogradoff—not in Moscow, for reasons not to be mentioned here—of Holmes at Washington and Ames at Harvard, of Alfred Lyall in London and Maitland at Cambridge. There is one word of sorrow to add for mighty men who have passed away from us. Lord Acton and Thayer are no longer captains in our host.

Ideal Character of the Movement.—We still have to consider why the University is specially bound to welcome this transformation, to be proud of her own share in it, and to render perpetual thanks to the great scholar and publicist who showed us the way to it in this country and place. It is a good thing that lawyers should be better instructed in legal antiquities, and that students, whether they aim at being historians or not, should be delivered from having fictions repeated to them as history. That is matter, so far as it goes, for reasonable satisfaction, but does not seem to have much to do with scholarship and humane letters in general. Surely there is something beyond this, and not the less because additions to positive knowledge are definable, but the spirit of an intellectual movement is not definable. Historical method has indeed given us more than knowledge; it has made our knowledge continuous where it was formerly dispersed; it has set an ideal in the place of a bare multitude of facts.

Maine taught us to find our profit in the ancient treasure of Eastern custom. Let us go to the symbolic aphorisms of the East to learn the final secret of Maine's wisdom. Muhammad Shamsu'-d-dín Háfiz of Shíráz wrote in one of his odes:—

> My heart is vexed by the solitude of Alexander's prison;
> I will truss up my baggage and get me to the kingdom of Solomon.
>
> (*Dil-am az waḥshat-i-zindán-i-Sikandar bi-girift:*
> *Rakht bar-bandam u tá mulk-i-Suleimán bi-ravam.*)

This couplet signifies, as the commentators tell us, that Háfiz was weary of staying in Isfahán and eager to return to his beloved city of Shíráz.

But Eastern poetry is full of double meanings, and it is not hard to discern here a more general spiritual meaning apart from the literal occasion. Alexander is the lord of this world, a conqueror of kingdoms with the sword of the flesh, a bestower of earthly riches; and Alexander's prison is the illusion wherein those men dwell whose desire is to worldly rewards and honours and all manner of transitory goods, and who deem such things to be of any worth for their own sake. But Solomon is the lord of wisdom and ruler of spirits, having the seal engraven with the Ineffable Name, by whose virtue he can summon angels and control demons; and Solomon's kingdom is the world of things eternal, wherein whatsoever is true and good and beautiful is worshipped for itself, and not for any temporal profit that it may bring; and Solomon's men are those who endeavour themselves to pursue that worship, holding the things of this world neither in overmuch honour nor in contempt, but as instruments to be used for higher ends. And the token of a man's allegiance to Solomon is that he knows it is better to be a doorkeeper in the temple than warder of all the prison. Now the prison of Alexander is paved with useful facts. But the pillars of Solomon's temple are ideas, and its headstones are the imaginations of genius which the men of practical sense despised, and the dome is built of the unity of all knowledge. And in the centre of the dome a jewel is set, flashing light perpetually throughout the temple; and the divers colours of its rays are the wisdom of the wise, but its whiteness is the infinite wisdom of God. And round about the dome is written the saying of the Lord when David asked him, Lord, since thou wast perfect, what need hadst thou to create the world? and the Lord made answer, I was a hidden treasure and I would be revealed. Whoever brings a fruitful idea to any branch of knowledge, or rends the veil that seems to sever one portion from another, his name is written in the book among the builders of the temple. Therefore, here in the Faculty of Law, we give thanks because our master Maine brought us into new and closer fellowship with our brethren of History and of Arts, and taught us to understand what it is that we inherit, and what has been the part of the law and of its ideas in the life of our nation.

The Future.—The work of the present generation in the field of comparative jurisprudence is mostly work of detail. Our great predecessors have annexed realms which it is for us to settle and administer. But there is no rest for knowledge, and for our children, if not for us, there will again be a time of large adventure. They will go forth to new conquests, perhaps armed with the weapons we have forged for them, perhaps with others of such fashion and power as we cannot even guess.

> Alter erit tum Tiphys et altera quae vehat Argo
> Dilectos heroas—

we may finish the line and say "erunt etiam altera bella," for our successors

will doubtless have their controversies too. But the contest will be bloodless and harmless, and the victory will be to truth; neither will our sons forget in their triumphs that we wrought, as best we might, to prepare the way for them. The quest will be ever new and the perils ever changing; but the goal will be the same, the temple which is not of the money-changers, but of Solomon in his spiritual glory. For it is also written by one of our own prophets, To labour in knowledge is to build up Jerusalem, and to despise knowledge is to despise Jerusalem and her builders.

INDIAN CONSTITUTIONAL LAW.[1]

[*Contributed by the* Hon. C. L. Tupper, C.S.I.,
Vice-Chancellor of the Punjab University.]

Two years ago in a Convocation address I dwelt upon the opportunities we have in the Punjab for contributing to the materials of scientific jurisprudence and upon the desirability of our University law students continuing the study of jurisprudence after entry upon the business of life. It was then in my mind to suggest Indian Constitutional Law as a proper subject for such post-graduate study; but I came to the conclusion that the matter required a separate paper to itself. Hence Indian Constitutional Law is my subject to-day; and I think it has more than a merely legal interest. Every graduate of an Indian university may very properly aspire to an adequate acquaintance with the principles of those enactments which constitute the governing body in India; and the like knowledge is clearly to be desired in the case of all of those whose actual or prospective duty it is to take part in Indian administration.

Meaning of Constitutional Law.—Let me first define my subject by a reference to Constitutional Law in general. Constitutional Law is the aggregate of the enacted law, case law, and usage which, in any given country, determines the composition of the governing body and regulates the manner in which that body may exercise its powers. This definition excludes mere despotisms, both because the existence of a governing body implies some division of sovereignty, and because in despotic governments there are neither enactments, the work of regularly established legislatures, nor case law, the work of regularly established Courts. The definition also excludes the usages which determine the structure of primitive governments, whether wholly despotic or, to use a convenient anachronism, more or less popular in type. The study of primitive governments—of which we have excellent specimens in the Hindu Raj of the Kángra District and the Beluch Tuman of Dera Gházi Khan—is part of the general study of legal evolution. But I am confining myself to-day to Indian Constitutional Law, and thus have no occasion to enter upon the general history of forms of government. I shall, however, have to dwell on the form of government

[1] An address delivered at the Convocation of the Punjab University on December 20th, 1902.

which was indigenous in India before British rule, so as to be able to explain some distinctive features of the form of government which has succeeded it.

Having defined Constitutional Law as above, my next point is that the number of the governing body is not of the essence of the question whether the structure of the particular government is or is not determined by some Constitutional Law. The constitution may be a pure democracy, as in the United States of America; or it may be a pure oligarchy, as in Venice in the fourteenth century; or a republic, which is really an aristocracy, as in ancient Athens or in Rome before the days of the Empire; or again it may be a highly complex organisation such as that of the British Empire, where we have not only King, Lords, and Commons, but powerful colonies with representative institutions, and a vast number of dependent States. Indian Constitutional Law belongs to the last of the classes which I have distinguished, because it is a part, and indeed a very small part, of the Constitutional Law of the British Empire.

My third preliminary remark follows from what I have already said. There may be a constitution without popular government, and that is our own case in this country. Constitutional Law does not necessarily imply representative institutions; but it does imply legality, which exempts the structure of government and the use of its powers from the vagaries of personal caprice.

Its Relation to General Jurisprudence.—I think I have now justified the position that there is a Constitutional Law in India, and I pass on to consider the relation of the study of that law to the study of general jurisprudence. It has often occurred to me that, if sociology is to make much progress, the vast area it covers must be divided into compartments, of which one would be law; and, in turn, when we come to examine legal evolution by itself, we should have to partition that field again and trace the growth of particular institutions, such as property in land, or marriage or succession; or particular branches of law, such as International Law or Constitutional Law. The scientific investigation of Constitutional Law would thus be a branch of scientific jurisprudence; and that again would be part of a gradually forming science of sociology. The investigation of Constitutional Law would extend to nearly the whole course of European history, and to the analysis of the various Constitutions now existing in the advanced States of the world. Imperceptibly it would transform itself into a sociological enquiry where it sought to separate primitive governments without constitutions from others where constitutions were in process of being formed. The study of Indian Constitutional Law would lie on the outer verge of such an investigation. It would be taken as part of the analysis of the Constitutional Law of the British Empire; and to that law its proper place would be assigned in the general scheme of legal evolution. We need not, however, attempt to fix that place as a preliminary to the study

of Indian Constitutional Law. The study I advise is limited and comparatively easy, and the materials are within reach, even for busy men.

Moreover, I do not recommend that graduates of the Punjab University should ordinarily study Indian Constitutional Law in its full extent. It is contained for the most part in certain Acts of Parliament which are applicable to British India; and these require historical comment before they can be properly understood. But there is one branch of Indian Constitutional Law which depends much more on usage than on any enactments, and of which the study is by no means necessary merely for the purpose of acquiring such general knowledge of the constitutional position in this country as men of good education should ordinarily possess. I refer to the relations between the British Government and the Native States; a subject which may well be left to specialists or to others who have any special taste or interest which may induce them to follow it up. To Punjab University graduates in general I commend the study of so much of Indian Constitutional Law as regulates the structure and powers of government in British territory.

Text-books on Indian Constitutional Law.—At one time or another most of them will have read Law Manual No. 2, which is entitled *Outlines of the Constitution of the British Government in India.* This is serviceable as an introduction to the subject, but it was published in 1885, before the annexation of Upper Burma and long before the separation of the North-West Frontier Province, which was effected only the other day. For this and some other reasons it appears to me to require a good deal of revision; and no doubt that will be effected before very long, or some other text-book will be substituted. The Parliamentary enactments relating to the Government of India are more than forty in number and range over a period of more than 120 years. I could not have reasonably proposed to our graduates that they should search out these enactments for themselves and, by their careful study and comparison, diagnose their combined effect. The fortunate circumstance which makes my present suggestion appear to me to be a reasonable one is that this work has been done for them and is ready to hand. I have only to refer them to the Digest compiled by Sir Courtenay Ilbert, which is contained in his book entitled *The Government of India*, published in 1898. Sir Courtenay Ilbert himself supplies an historical introduction of great value, and the references which he gives will readily suggest further lines of research to those who have the time and inclination to go further. But to Sir Courtenay Ilbert's introduction I would add for all students, as one supplement, Sir Alfred Lyall's book called *The Rise and Expansion of the British Dominion in India*; and for those students who may desire to form a serious and well-considered opinion on the political prospects of this country, I would add, as a second supplement, the work of Sir Henry Maine called *Popular Government*, published in 1885.

The Scheme of Indian Government.—Now Sir Courtenay Ilbert's Digest shows that the present frame of the Government of India has been very

deliberately designed and fixed in position by the supreme authority in the British Empire. The Digest is a digest of existing Parliamentary enactments relating to the Government of India, and it may therefore be taken as an epitome of the intentions of the British nation as to the manner in which this country shall be governed. Considering the Digest as a whole, I observe that, like many of our institutions in this country, our form of government has a double origin, both from the East and from the West. It bears traces alike of the effects of the history of India before our day and of the influence of our own political ideas and system upon Indian society. First in authority is the Secretary of State, a Cabinet Minister in direct touch with the most powerful springs of action in Parliament. In certain matters he must act with the concurrence of a majority of his Council; but in all other matters he can overrule his Council; and in certain other matters, if the case be one of urgency or secrecy, he can act without any reference to his Council at all. Somewhat similarly the Governor-General is ordinarily bound by the opinion and decision of a majority of his Council; but if the measure proposed may in his judgment essentially affect the safety, tranquillity, or interest of British India or of any part thereof, he may on his own authority adopt, suspend, or reject the measure in whole or part. Further, the Governor-General, acting alone, may in cases of emergency make ordinances for the peace and good government of British India or any part thereof, and any ordinance so made has, for such period not exceeding six months, as may be declared in the notification, the like force of law to a law made by the Governor-General in Council at a legislative meeting. Subordinate to the Governor-General in Council, there are, as you know, the Governors, Lieutenant-Governors, and Chief Commissioners, all with powers defined and limited by sundry enactments. Madras, Bombay, Bengal, the United Provinces, the Punjab, and Burma have local Legislative Councils of which I shall say something more below. The great Durbar which will be held next month at Delhi will in itself be a living epitome of the constitution of the Indian Empire; for there will be assembled the heads of Local Governments, the agents to the Governor-General for State territory, and the principal ruling chiefs.

In this great Government, which will thus be conspicuous on a remarkable occasion before the whole civilised world, there is indeed some analogy to the lesser governments of the Crown Colonies, a great and striking analogy to the Empire of Rome, and an analogy, sometimes too little remembered, to the Delhi Empire of which it is the successor. It is wholly unlike the governments which have gradually grown up where men of British race have peopled the waste places of the earth. The Governments of the United States, of Canada, of Australia are popular governments. The Indian Government falls rather within the category of personal governments; but with this all-important distinction—that the pervading influence of law redeems it from the besetting vice of governments of that type. It is

personal government from which personal caprice is excluded by the general requirement that there shall be legal warrant for the exercise of all official authority.

England has been justly described as the Mother of Parliaments. It is not perhaps generally remembered that popular government is comparatively speaking a novelty in the history of the world. Sir Henry Maine has pointed out that "the modern popular government of our day is of purely English origin"; that the principle of modern popular government was affirmed some two centuries ago by events which happened in the British Isles; and that the practical applications of that principle outside those islands and their dependencies is only about a century old. America copied the English constitution. "The British political model," says the same high authority, "was followed by France, by Spain and Portugal, and by Holland and Belgium combined in the kingdom of the Netherlands; and after a long interval by Germany, Italy, and Austria."

Now how is it that the Mother of Parliaments, the country whose history is the very source of modern institutions which have overspread three continents—taking newly federated Australia as the third—how is it that such a country has given to India a government of a different type?

The Type Conditioned by the History of India.—The type has not been reached without prolonged effort. It is the outcome of many experiments—one at least of which, the Regulating Act of 1773, was a disastrous failure. It is the result of repeated Parliamentary enquiries held usually at intervals of twenty years. There would have been no want of will to transplant British institutions to this country; but that process understood literally, not as the modification of Indian institutions to bring them into some accord with British ideas, was soon shown by experience to be impracticable. Here, as in other matters, "limits we did not set condition all we do." British authority in India has been derived not only from Parliamentary enactments, but also from the Delhi emperors and other native rulers. History does not escape the great law of evolution; and against forces which work with the irresistible consistency of Nature it is idle to contend. There were political forces at work in India before our day which determined, and in a great measure determine still, the Indian form of government.

Personal government, I would point out, was the indigenous system evolved in the normal conditions of Indian society when as yet unmodified by western conquest and western ideas.

In saying this I imply no disparagement of the indigenous system, even though it was not regulated by law and fixed rules of administration. As students of history and jurisprudence, we should examine political forms in the same dispassionate way as forms of plant or animal life. If we do this, we see that personal government in various forms—in the chiefships of fighting tribes, in the kingships of city states, in the great monarchies

which superseded feudalism, in a diverse assortment of empires—Oriental, Roman, Holy Roman, and French—has played an enormous part in political development. And we may reasonably infer that such an institution is in a certain sense natural to man; that is to say, it is produced amongst institutions by the survival of the fittest—the fittest not being necessarily that which we morally approve, but that which is best suited to its environment. From this point of view I should hold that the form of personal government which we found existing in India, being historically the product of the centuries which preceded our rule, was therefore presumably the form of government best suited to the conditions of the country and time. It was, indeed, the creature of those conditions. The foreign empire of the Moghals broke up; and the indigenous Indian State, or a copy of it, appeared or reappeared everywhere.

Political Evolution in India.—I must dwell for a short time on that remark, because the expansion of it will enable me to explain why it is that I hold the form of our Indian Government to be still largely determined by the history of the country both before and during our day. There is a temptation to contrast the progress of Europe with the immobility of the East; and to classify India with China and ancient Egypt as countries exhibiting specimens of arrested development, of civilisations never consummated, but somehow brought, after a fair degree of advancement, to a permanent stop. This temptation has long seemed to me to be one to be resisted. I cannot reconcile the theory of the immobility of certain societies with the application of the doctrine of evolution to politics; nor with the belief that political societies are organisms which grow like living things. I would rather admit that growth may be under some conditions as extraordinarily slow as it is under other conditions extraordinarily rapid; and assert that if there is development, there is also decadence. However this may be, whether there is or is not any such thing as an actually stationary society, it is beyond doubt that in India of the eighteenth century there was a vast political movement over the whole country, which originated in the country itself from causes other than the appearance on the scene of European adventurers. We speak of the disruption of the Moghal Empire; but we are perhaps apt to forget that long before we built up our Empire out of the ruins, a certain work of reconstruction had already begun. At the time when the rise of British dominion was imminent or in process of accomplishment, the distinctive feature in the political situation of India was the formation of new States. Our own successes illustrated the general tendency. The East India Company did in fact become one of a vast number of States which, all over India, were seeking to strengthen or extend their political power. Great States were formed out of enormous fragments of the broken Delhi Empire—in Oudh, in Bengal, in the Deccan. The rival Mahratta Empire was breaking up into the dominions of the Gaekwar, of Sindhia, of Holkar, of the Bhonsla, when its progress to general

supremacy was stopped by collision with ourselves. And besides these kingdoms representing a Muhammadan empire in its decadence, and a Hindu revival to which that decadence gave its chance, there were two great military kingdoms founded mainly on successful violence—by Hyder Ali in Mysore and by Ranjit Singh in the Punjab. What was being done on a larger scale by the rebellious governors of the Delhi emperors, by the generals and statesmen of the Mahratta Confederacy, and by the most prominent leaders of military bands, was being done on a smaller scale by smaller men in many widely distant parts of the country. The disruption of the central authority gave the opportunity to political adventurers of various kinds and creeds—to Muhammadans, Sikhs, Hindus, French, and English—to carve out for themselves petty principalities, or to convert into more or less dependent States territorial grants made by ruling authorities. Amongst such adventurers were the Poligars of Southern India, the Sattara and Southern Mahratta jagirdars, and the Sikh jagirdars and other chiefs of the Cis-Sutlej territory. Moreover, we rolled back, on the south and west, the advancing battalions of the Mahrattas; and in the north, the military strength of the Nepalese; and as the smoke and dust of the combat cleared away States of older formation—in Rajputana, in Central India, and in the Punjab Hills—stood forth with exceptional clearness.

The pre-English Period.—Thus if we look to the whole of India—I exclude here Burma and Beluchistan—as it has fallen bit by bit under British supremacy, we see it as a vast mosaic of States, some old, some new, but all alike in this—that they were under personal government. If we ask at what stage of political growth were the populations of India at the time when British supremacy was impending, the answer is that they were at the stage of territorial despotism. Sovereignty was supposed to reside in the chief of the State, who might be, and often was, the head of a dominant clan, but also often had no tribal root in the soil and was merely a foreign conqueror. There were indeed large bodies of law—Hindu and Muhammadan law, known to experts and customary law, certainly in the Punjab and probably elsewhere. But there was no legislation; there was nothing which we should accept as a regular administration of justice with a hard and fast distinction between executive and judicial authority; there was some separation of public functions; a group of great officers of State amongst the Mahrattas, a distinction between the civil and revenue and the criminal administration in Bengal; but whatever was the law, and whoever were the ministers or the local representatives of the State, the theory was that the chief of the State was absolute. It is exactly this absolutism which is crushed by the increasing strength of the reign of law. But it was probably at one time the necessary defence of any kingdom against organised brigandage within its borders, and ever-impending and wholly unscrupulous attack from without.

As to our own share in the general scramble for political authority, we

succeeded to a dilapidated province of the Delhi Empire, itself a foreign empire aiming, in its latter days quite unsuccessfully, at official rule under the general control of a central government. The administration of our predecessors had broken down, leaving only traces of itself amid general anarchy. For years we struggled to keep the administration or much of it in native hands. We did not "stand forth as Dewán" till seven years after the formal grant of the Dewáni; we did not stand forth as *Hákim*, openly taking over the whole administration of criminal justice, till 1790, thirty-three years after the Battle of Plassey had virtually placed the sovereignty of the country in our hands. For years we tried experiment after experiment intended to maintain the Moghal system of management under European superintendence, and indeed avowedly designed to preserve, in the language of the Court of Directors, "those rules and maxims of policy which prevailed in well-regulated periods of the Native Government." Thus what we sought to support, and did in the sequel reproduce with many improvements, was rather the official system of the Moghals than the indigenous Indian State. But the provincial organisation of the Delhi Empire had itself largely copied the older governments which it superseded; and the imperial provinces and the indigenous States were alike in this—that all were examples of personal rule.

The Element of Personal Rule.—I think I have now said enough to show from what quarter it was that we gathered the elements of personal rule that are still present in our Indian administration. If it is a sound political principle that we should adjust the political institutions of a country to its existing stage of political growth, then, looking to the stability of most of what is indigenous in India and the merely superficial effect of changes of government on the ideas and customs of the peasantry—that is, of the bulk of the population—it will, I think, be admitted that some infusion of the personal element was and is indispensable in our constitution. But the very same principle implies that as society changes the institutions which are intended to be suited to its condition should change with it. It may be contended this principle also is satisfied in our constitution as it is. The most momentous changes which have happened in India are the establishment of British authority and the influx of western ideas. The peasantry are little affected by the latter; but educated men are compelled to review their hereditary mental equipment and adapt it to forces which they cannot resist. Western ideas naturally generate western aspirations, and endeavours have been made to meet them in a manner consistent with the maintenance of security. At both ends of the administrative scale, locally in District Boards and Municipal Committees and provincially for the country at large in the Legislative Councils, we have institutions which are of western origin, and in frame and purpose unlike anything that was organised by our predecessors. I should be trenching on the ground of current politics were I to say anything here regarding the Boards and Committees; but I

have sketched elsewhere,[1] in more passages than one, the history of the Legislative Councils, and I have found it full of interest and full of promise. You doubtless know that in the Council of the Governor-General the Financial Statement may now be discussed, and under carefully considered rules questions may be asked on public affairs. The nominations to five seats on the Governor-General's Council are made on the recommendations of the Calcutta Chamber of Commerce and of the non-official members or additional members of the Councils of Madras, Bombay, Bengal, and the United Provinces. Similarly in Madras, Bombay, Bengal, and the United Provinces persons may be recommended for nomination to the Local Legislative Council by certain bodies and associations, including the Corporations of Madras, Bombay, and Calcutta and the Senates of the several Universities. For such arrangements we are hardly prepared in the Punjab; but we may congratulate ourselves on having obtained a Legislative Council of our own, more particularly because it affords an opportunity of associating private persons with official members in the inspiring work of good government. Some of our graduates will doubtless rise in time to be members of our Council, and that is in itself an additional reason for that study of Constitutional Law which I recommend.

Attitude of the Educated towards the Future.—I have thought it not beyond my duty as Vice-Chancellor to commend to our graduates a certain course of study; and I wish to say, in conclusion, a few words as to the spirit in which, as I conceive, that study should be approached. As Punjabis they are the friends and supporters of the British Government; and they will therefore sympathise with the consistent efforts made by Parliament during the past 120 years to establish here a system of government which shall be suited to the actual conditions of this country and at the same time satisfactory to the political consciousness of the British nation at large. As men of education and common sense our graduates will hesitate to advocate changes before the time for them is ripe; and will recognise that before advocating changes it is prudent to understand both the reasons for any existing system and the exact advantages to be gained by its alteration. Those amongst our graduates who are students of history and jurisprudence will know that lines of advance are settled by preceding ages, and that it is as childish as it is vain to imagine that the heirs of the ages can discard their inheritance and create their environment anew. The best safeguard, says Sir Henry Maine,[2] against various political delusions and extravagances which he examines, is a little better knowledge of the true lines of movement which have been followed by the political affairs of mankind. It is at least extremely doubtful whether any country can benefit by the adoption of institutions which

[1] *Our Indian Protectorate*, pp. 346, 347. *India and Sir Henry Maine* (Journal of the Society of Arts for March 18th, 1898), pp. 392, 394.

[2] *Popular Government*, p. 78.

have not grown with its own growth or been the natural outcome of its own history.

I said in an early part of this paper that Indian Constitutional Law is part of the Constitutional Law of the British Empire. Above all things that is the point of view from which I hope that our graduates will regard it. Like others of us here, they are subjects of a vast and varied Empire, whose institutions must be adapted to the diversity of the populations under its sway. From that Empire two political evils of great magnitude—tyranny and slavery—are banished. Personal liberty and the protection of the law are our birth-right. These possessions are more precious than the distribution of votes; for they are the foundation of justice, and in them there is no corruption. Let us be glad that we belong to an Empire whose children in this sense are free, and whose lasting ideal of government—though some particular measures may by misadventure miscarry—is justice, beneficence, and security.

BRITISH COMPANIES IN GERMANY.

[*Contributed by* Ernest J. Schuster, LL.D.]

The incorporation of companies under the British Companies Acts for the purpose of carrying on business by branch establishments in foreign countries is by no means an unusual occurrence, but owing to a variety of causes the many inconveniences and difficulties which are apt to occur owing to unexpected effects of the provisions of foreign law affecting such companies are very little known. I propose, without going into minute details, to give a summary of the provisions of German law affecting British companies having branch establishments in Germany, which will bring out some of the questions which may arise in any foreign country, and are therefore to a certain extent typical, though probably they do not exhaust all the possible pitfalls offered by the application of foreign law.

Recognition of Corporate Rights.—By virtue of a convention dated 1874, British companies duly constituted as such in conformity with British law enjoy "the power of exercising all their rights and of appearing before the tribunals, whether for the purpose of bringing an action or defending the same," of the German Empire. The meaning of this is that a company duly incorporated according to British law is recognised as a corporate body in Germany, but it does not follow from the terms of the convention that any English company may, as a matter of course, establish a branch establishment and carry on business within the German Empire. The question whether and subject to what conditions and restrictions this can be done in any given case depends upon German Imperial and German State law.

Permission to Trade.—The question whether a non-German company may carry on business in any particular German State with or without Government permission depends upon the law of that State (Reichsgewerbordnung, s. 12). In the kingdom of Prussia (Prussian Statute of June 22nd, 1861, Art. 18), in the kingdom of Bavaria (Bavarian Statute of January 30th, 1868, Art. 2 [3]), and in the kingdom of Saxony (Order in Council dated November 10th, 1899, s. 5), foreign incorporated companies cannot carry on trade without Government permission, except in so far as any international agreement provides otherwise. In some States permission is not required, if it can be shown that in the State in which the non-German company was

incorporated a German company can carry on trade without Government permission (*e.g.*, in the Grand Duchy of Hesse: see Statute of July 20th, 1899, Art. 3; see also the Statute of the Grand Duchy of Baden of December 21st, 1871, Art. 2, and the Wurttemberg Statute of July 28th, 1899, Art. 282).

Where Government permission is required, the power to grant or withhold it is entirely discretionary, and permission may be refused arbitrarily or made subject to the performance of the most unreasonable conditions. In a case which came under my notice an English company had purchased a factory in Bavaria from a somewhat impecunious vendor. The Government, on the application of the English company for permission to carry on business, informed the applicants that the permission could only be granted on the production of evidence showing that all the outstanding trade debts of the vendor (which under the purchasing agreement were to be discharged by the vendor and not by the purchasing company) had been paid. As this was not done, the permission was refused.

Permission to Own Land.—The question whether and to what extent Government permission is required for the acquisition of land on the part of non-German companies, like the question discussed above, is governed by State law, and there is considerable diversity in respect of it between the laws of the several German States. In Prussia a non-Prussian German company cannot acquire land of a value exceeding 5000 marks, and a non-German company cannot acquire land of any value without Government permission (see Prussian Statute of September 20th, 1899, Art. 7, s. 2). In most other German States Government permission is not required for the acquisition of land by non-German trading companies, but in some cases the right to acquire land and to be registered as owner in the Land Register without Government permission is made dependent upon the production of evidence showing that the law of the State in which the applicant company was incorporated allows German companies to acquire land without Government permission (see, for instance, the Statute of the Grand Duchy of Hesse of July 17th, 1899, Art. 15).

Registration in the Commercial Register.—Commercial registers are kept in Germany in connection with the local Courts,[1] and one of the judges of each Court to which such a registry is attached acts as registrar.

An English company wishing to establish a branch establishment in Germany must apply for registration to the registrar of the district in which such branch establishment is to be situate. The application must be accompanied by evidence proving the corporate existence of the company, and by an authenticated copy of the memorandum and articles of association, and, in any case in which Government permission is required for the purpose of carrying on business, the document by means of which such permission was granted must also be filed with the registrar; in addition to this, detailed

[1] There are 1,933 local Courts in the German Empire.

information must be supplied on a number of specified matters, including the constitution of the board of directors, the amount and division of the share capital, etc. In the case of a company formed within the last two years preceding the date of the application, it is also necessary to supply particulars as to promotion contracts and contracts with vendors of property, and as to a number of other specified matters connected with the formation of the company (German Commercial Code, ss. 201, 199, 182–186).

Publicity of Facts Connected with the Formation of Companies Applying for Registration.—A notice as to the registration is published by the registrar in the German *Official Gazette* and in such other papers as are issued for the official announcements of the Court of which he is a judge (German Commercial Code, ss. 10 and 11). The publications in question are a subject of great interest to the German revenue authorities, and the knowledge which they acquire by their perusal, as will be seen below, is not allowed to remain unfruitful.

Stamp Duties Payable in Respect of Non-German Companies.—A non-German company registering a branch establishment in Germany is *ex hypothesi* formed outside of Germany, and it seems illogical and harsh to make it pay an *ad valorem* stamp duty in Germany on its whole capital, in the same way as if the company had been formed in Germany. Yet this is done in at least one German State, and as several other kinds of stamp duties may become payable in addition to this *ad valorem* duty in respect of the formation of the company, the luxury of a branch establishment in Germany is in many cases an expensive one. In a case which has recently come to my notice, three kinds of stamp duties were claimed on the registration of the branch establishment of an English company in the Grand Duchy of Hesse—namely (*a*) Hessian stamp duty; (*b*) German Imperial duty under two separate heads.

(*a*) *State Duty.*—In a number of German States the memorandum of association of a company is subject to *ad valorem* stamp duty (see, for instance, Prussian Statute, July 31st, 1895, Schedule No. 25). The imposition of this duty is thought by some authorities to be *ultra vires* and contrary to the provisions of the Imperial law (see Staub's edition of the German Commercial Code, 7th ed., vol. i. p. 549); but whatever view may be taken on this point, in most German States a company incorporated outside of the State in which it has a branch establishment is not subject to State duty in respect of its formation. In the Hessian Statute on the subject there is, however, a clause which enacts that any document used before any Hessian authority, whether executed within or outside the Grand Duchy, must be stamped in accordance with the State law, the authenticated copy of an unstamped document being for that purpose deemed the original document. Under these clauses the Hessian authorities did in fact claim the full *ad valorem* stamp duty on the capital of an English company registering a branch establishment in the Grand Duchy, on the ground that an authenti-

cated copy of the memorandum was filed in the Hessian registry and was therefore used before a Hessian authority. The Court of First Instance to whom the claim was submitted for adjudication decided in its favour, and the local lawyers advised that an appeal had no chance of success.

(*b*) *Imperial Duties.*—According to the Imperial Stamp Law of 1900, negotiable instruments issued outside the German Empire must be stamped with an *ad valorem* stamp within fourteen days from the date at which they are *received* in Germany, regardless of the fact whether such negotiable instruments are to be negotiated or used for any purpose in Germany. As in Germany shares in companies are generally represented by bearer certificates, and in the few exceptional cases in which the shares are inscribed in names the certificates are transferred by endorsement, the German Courts do not seem to recognise the possibility that there may be share certificates which are not negotiable instruments, and the Supreme Imperial Court at Leipzig, whenever the question has come before it, has held that certificates similar to English share certificates are negotiable instruments within the meaning of the German Stamp Law and must be stamped accordingly (see the Reports of the Imperial Court in Civil Matters, vol. xxxvi. p. 154).

The stamp duty on foreign negotiable instruments amounts to $2\frac{1}{2}$ per cent., but so that not less than $2\frac{1}{2}$ marks are payable in respect of any individual instrument. For the purpose of the Stamp Law each share is looked upon as a separate instrument, notwithstanding the fact that the certificate relates to a number of shares (see the report quoted above on p. 159). (In another case [vol. xlii. p. 39] a Danish certificate issued for a number of shares was looked upon as the unit, but this was done on the ground that it did not indicate the separate numbers for the several shares.) The result is that in the case of £1 shares the amount of $2\frac{1}{2}$ marks—being equal to about $12\frac{1}{2}$ per cent. of the nominal amount—is payable on each share, notwithstanding the fact that a number of shares are comprised in one certificate. In the Hessian case to which I have referred, the vendor of the property acquired by the English company had received shares for a considerable amount in payment of the purchase price, and this fact had to be notified on registration, and thus became known to the revenue authorities. Unfortunately for himself, the vendor, instead of depositing the certificate with some English bank, had taken it into his own custody in Germany, whereupon German stamp duty was claimed from him on the principle stated by me at a rate involving a payment of $12\frac{1}{2}$ per cent. on the amount of his shares. But this was not all. The allotment of vendor's shares by a company is subject to the same *ad valorem* Imperial duty as the purchase of shares, and this allotment duty was also claimed, notwithstanding the fact that the allotment was made in England in connection with the formation of an English company.

It is hoped that the last word has not as yet been spoken on these questions, but for the present an English company registering a branch

establishment in Germany will have to consider the possibility of three classes of duty being imposed: (1) State duty on the memorandum of association; (2) duty on the shares allotted to the vendor if he resides in Germany and the certificate is received by him; (3) duty on the allotment of the vendor's shares. The two last-mentioned duties are payable by the vendor and not by the company, but if the vendor is aware of the fact, he will of course add their amount to the purchase price or ask to be indemnified in respect of all claims for duty.

Charges and Mortgages on German Property for the Security of Debenture-Holders.—English lawyers some time ago became aware of the fact that a charge or mortgage on immovable property situate in a foreign country is not fully effective unless some entry relating thereto is made in the local land registry, and it is generally thought that if such entry is made in accordance with the advice of a competent local lawyer, the interests of the debenture-holders are sufficiently protected; but experience shows that this is not always the case. In many countries, including Germany, debentures, as a general rule, are not secured by any charge on property; and in the exceptional cases (which of late are rather on the increase) in which such security is given, the charge is either registered in the name of a single trustee —being some powerful joint stock bank or other company (in whose case some of the difficulties referred to below cannot arise at all, while the other difficulties—though possible in theory, are not likely to occur), or it is registered in favour of the debenture issue in the manner mentioned below. The foreign lawyers, therefore, not being accustomed to the special manner in which the debentures of English companies are generally secured, and not having any knowledge as to the position and duties of trustees under English law, cannot possibly call attention to the characteristic differences between foreign and English law in respect of the matters in question. In the case of German property the principal difficulty arises in the event of one or more of the debenture trustees being German subjects domiciled within the German Empire. An English lawyer assumes that, when a charge is made and registered in favour of several persons jointly, none of them is entitled to deal with the charge without the concurrence of the others or other, and that on the death of one of the joint incumbrancers, the charge becomes vested in the survivor or the survivors; but this assumption is not justified in so far as German law is applicable; wherever this is the case, an entry to the effect which I have mentioned would give to each of the registered incumbrancers an undivided share in the charge, which share, in so far as the owner is subject to German law, can be disposed of by him and is available for his judgment debtors, and in the event of bankruptcy forms part of the assets divisible among his creditors, it being left to the persons for the time being representing the debenture-holders to prove in the bankruptcy for the amount of the charge (the exception in favour of trust property existing in England under the Bankruptcy Act, 1883, s. 44 [1], not being recog-

nised by German bankruptcy law). In the event of the death of one of the registered incumbrancers, his undivided share, in so far as the German law is applicable, passes to the persons beneficially entitled to his estate, and, inasmuch as executors are but rarely appointed in Germany, cannot, as a general rule, be transferred without the concurrence of each of such beneficiaries. Where any beneficiaries are infants or lunatics or absent in distant parts of the world, this may lead to great inconvenience, expense, and delay. Under the new German law which came into force in 1900, the registrar when entering a charge in favour of several persons has to give particulars as to the mode of division (Grundbuchordnung, s. 48), but before 1900 this was unnecessary, and any such charge registered before 1900 is deemed to belong to the registered incumbrancers as tenants in common in equal shares. The power of voluntary alienation by one of the trustees of his share in the charge can be frustrated to a certain extent by putting the certificates of charge under the joint control of all the trustees, but where one of the trustees resides in Germany it is frequently thought convenient that the certificates should be in his hands, and his power of disposal is then complete, and even in a case in which the certificates of charge are put under joint control, the difficulties arising in the event of bankruptcy or death are unavoidable. If all the trustees are domiciled in England, involuntary alienation is of course absolutely prevented; voluntary alienation without the concurrence of all the trustees may be made impossible by depositing the certificates of charge in a bank in the joint names of all the trustees, and though in case of death the German registrar may require evidence as to the right of the survivor or survivors to have the whole charge transferred into his or their names, it will always be easy to supply such evidence.

I have mentioned the fact that under the new German law it is possible to register a charge in favour of the debenture issue as such, but this can be done only in respect of debentures issued to bearer or negotiable by endorsement (German Civil Code, s. 1187).

Where a charge for the protection of such debentures is registered, the company issuing the debentures may appoint an attorney, who has certain powers in respect of the enforcement of the charge (German Civil Code, s. 1189), but whose powers would not go as far as the powers of trustees for debenture-holders under English law. There are many practical objections against the use of this method by an English company owning German land, but it is not open to the same objection as the registration of the charge in favour of several trustees one or more of whom are domiciled in Germany.

Special Provisions as to Particular Classes of Companies.—As a matter of course certain kinds of business are, in all countries, subject to special Government supervision or dependent upon the possession of Government licences, and such provisions concern companies as well as private traders, and foreign companies as well as companies formed in the country in which

the regulations are made. It is not the object of this paper to deal with such regulations, but it is necessary to mention some special provisions of German law by which a distinction is drawn between German and non-German companies in respect of the conditions under which certain kinds of business are allowed to be carried on in Germany.

The most conspicuous instance is that of insurance companies. Before 1902 the regulations on this subject depended on State law, but in 1902 an Imperial Statute dealing therewith came into force, of which a summary was given in this journal (N.S., 1902, pp. 193–194). The Statute draws the following distinctions between German and non-German insurance companies :

(*a*) Government permission is necessary in either case, but in the case of a German company it can be refused on definite grounds only, whilst in the case of non-German companies the permission may be granted or withheld in the unfettered discretion of the Imperial Chancellor (*see* the Imperial Statute of 1901, ss. 4, 5, 86).

(*b*) A German insurance company can be ordered to discontinue business on certain specified grounds ; on the other hand, the Federal Council, on the application of the Imperial Chancellor, may order a non-German insurance company to discontinue business in its unfettered discretion, without giving any reason (*ibid.*, ss. 67, 91).

(*c*) If a German insurance company carries on business in a State other than the State in which it has its central establishment, the agent conducting the business of the branch establishment cannot enter into contracts relating to life insurance without the consent of the directors of the central establishment, which must be certified on the policy or annuity contract. A non-German company carrying on business in Germany must appoint an agent having unlimited power to enter into annuity contracts and to issue life policies, and any conditions limiting such power or making its exercise conditional on the assent of the directors of the company is void and of no effect as between the company and the annuitants or policy-holders (*ibid.*, ss. 115, 86).

(*d*) A German life insurance company, while carrying on business, retains the control of the funds set apart as a special reserve for its life business in accordance with the statutory provision ; in the case of a non-German company, on the other hand, the fund in question must be deposited in Germany in such a way that no part of it can be withdrawn without the concurrence of the Imperial Board of Control (*ibid.*, ss. 57, 90).

As regards banks, the *only* State where a distinction appears to be drawn between German and non-German companies is the kingdom of Wurttemberg. In that State non-German companies are, as a general rule, allowed

to trade without special Government permission, unless in the country in which they were incorporated; companies formed in Wurttemberg are treated in a less liberal manner. But banking or loan businesses may not in any case be carried on in Wurttemberg by any non-German company without special Government permission (Wurttemberg Statute of July 28th, 1899, Art. 282).

Duties Imposed on Non-German Companies while Carrying on Business in Germany.—It is hardly necessary to mention that the branch establishment of a non-German company is subject to taxation and such other regulations as traders carrying on business in Germany are generally subject to, but owing to the differences between English and German company law and the constitution of English and German companies, it is sometimes difficult to know how far the German regulations are to be applied to English companies; this difficulty arises specially with regard to the registration and publication of facts which in the case of German companies require registration and publication. The following rules on this subject are generally accepted: All alterations as to any of the matters on which information must be entered in the register in the first instance must be notified to the registrar, and the duty of notification arises specially in the case of any changes in the constitution of the company or of the board of directors, or in the amount or division of the capital. If any fact which has been registered in the Commercial Register is subsequently altered, any person not having notice of the change is not affected by the alteration unless it was registered. Therefore if a power of attorney under which any manager can act on behalf of the company is registered, the revocation of such power must also be registered. If any non-German company having a branch establishment in Germany under its own law or under its articles of association is required to publish any annual statements of accounts in the country of its incorporation, then it is also necessary to publish the same statements in the German *Official Gazette* (Commercial Code, ss. 201, 13, 15, and see the notes thereon in the editions of Staub and of Lehmann-Ring, see also Pinner, *Das deutsche Aktienrecht*, p. 70).

In some respects the branch establishments of non-German companies have the privileges of traders carrying on business in Germany. Thus, for instance, the protection of the Trade Mark Statute of 1894, which is restricted to persons or corporations having a trading establishment within the German Empire, is accorded to foreign companies having a German branch establishment (Reports of the decisions of the Supreme Imperial Court in Civil Matters, vol. xli. p. 66). On the other hand, the fact of having a branch establishment in Germany does not entitle a non-German company to bring an action in a German Court without giving the security for costs which persons not being Germans have to give whenever they are plaintiffs in a German Court (*ibid.*, vol. xxxviii. p. 403).

Winding-up of Non-German Companies.—In the event of a winding-up,

the names of the liquidators have to be registered, and the liquidators have to issue three public announcements in the German *Official Gazette* requesting creditors to present their claims (Commercial Code, ss. 296, 369; see also s. 34).

General Observations.—The contrast between the treatment of English companies in Germany and that of foreign companies in England is very striking. In England any foreign company can carry on business by means of a branch establishment without Government permission of any sort, without any duty as to registration, and without any necessity to pay stamp duty with reference to its formation. Foreign life assurance companies have to make a deposit in the same manner as English life insurance companies, and are entitled to the return of the deposit after having formed the required reserve fund under the same rules as are applicable to English companies. Warrants for bearer shares in foreign companies are subject to a duty of $\frac{1}{2}$ per cent. under the Finance Act, 1899, s. 4 (1), but only in the event of their being negotiated in England, and mere holding of shares in a foreign company imposes no stamp duty on the holder. It is obvious, therefore, that German companies are treated in England with a liberality which is not reciprocated in the case of English companies carrying on business in Germany; but while some of the inequalities to which I have referred are avoidable, and might be removed by international agreement, it must be admitted that some of the German regulations appear to be useful and worthy of imitation. It seems only reasonable that a company having a branch establishment in a foreign country should be compelled to supply information as to its capital, as to the principal regulations affecting its constitution, and as to the extent of the authority of its managers or directors, and that such information should be accessible by means of a public register, and there seem to be no insuperable obstacles to the introduction of such a system in this country.

The inconveniences I have pointed out with reference to the registration of charges in Germany in the names of several persons are too much connected with the general system of law to be capable of modification, but, as shown above, they may be considerably mitigated by the appointment of persons domiciled in England as trustees for debenture-holders.

It is obviously desirable that English lawyers should be acquainted with the points as to which enquiry is necessary in cases where they have to advise on the establishment of English companies in foreign countries, or on the efficiency of charges on German property, and it is to be hoped that from this point of view the foregoing observations will prove to be of some use.

THE BASIS OF EMPLOYERS' LIABILITY FOR ACTS OF THEIR SERVANTS.

[*Contributed by* A. Pearce Higgins, Esq., M.A., LL.M.]

A Growing Consensus.—There are few rules of law for which so many different reasons are given, as that which renders a master liable for the injuries inflicted by his servants. The historical development of the doctrine in the English Common Law has received exhaustive treatment at the hands of Mr. Wigmore,[1] and Sir. F. Pollock has dealt with the reasons which underlie this rule in modern English law.[2] The rule is not peculiar to systems based on the Common Law—it is in force throughout the civilised world; and an examination of the reasons advanced for its existence in Germany, Austria, and the countries whose legal system is based on the Code Civil will show that the results arrived at for England are not dissimilar to those which have been reached, or are being reached, under other systems.

Under the Germanic Codes.—The modern codification in German-speaking countries starts with the general principle that every man is responsible only for his own wrongful acts, or, as the Austrian Code states it in Art. 1313, "For unlawful acts which are not one's own a man is not as a rule answerable." There must be some actual blame, some subjective liability, and so the two following articles lay down an exception, and provide that if any one engages a servant without a character, or knowingly keeps in his service persons who are dangerous by temperament or character, or gives shelter to a known criminal, he must make compensation for injuries caused by such persons, and further, he who knowingly employs a dangerous or incompetent person has to answer for any injuries he may inflict on third persons.

Connected with this subject, Art. 1161 provides that only in the most urgent cases can a workman or foreman employ another to do work entrusted to himself, and in such cases he is liable for negligence in the choice of such person.

The Prussian Landrecht of 1794 lays down rules similar to those which were adopted by the Austrian Code. It starts with the same general proposition that a master or employer is not as a rule liable for acts of his

[1] *Harvard Law Review*, vol. vii. [2] *Essays in Jurisprudence and Ethics*, p. 114.

servants or workmen,[1] but it goes on to recognise the liability arising from *culpa in eligendo* on the part of the master by providing that he must answer "for his domestics or servants when he himself is to blame, when, knowing the incapacity or negligence of his servant, he nevertheless keeps him in his service to do work for which he knows he is incapable," and as soon as it is proved that an injury has been committed by his domestic servants, workmen, or apprentices, or by any occupant of his house, and the master, employer, or landlord cannot ascertain the wrong-doer, an action lies against him.

The view of the Prussian and Austrian Codes, therefore, was that a man was not liable for the acts of others, unless he was himself to blame for having made a bad choice of his servants. This rule of the codes was extended by subsequent legislation both in Germany and Austria[2] in the case of railways and other specified undertakings, and in these cases an absolute liability was imposed on specified employers for acts of their servants in their employment.

Under the Code Civil.—The basis of the modern French Law is the Code Civil, which in the main represents the Code Napoleon. It was, until the passing of the new German Code in 1896, the law obtaining in the Prussian Rhine Provinces, the Rhenish part of the Grand Duchy of Hesse, and Bavaria. The Baden Landrecht is a modified translation of the Code. The Code Napoleon also constitutes the basis of the law of Belgium and, with modifications, Italy, Spain, Chili, Mexicó, Mauritius, and Lower Canada. Art. 1384 is as follows: "Every one is responsible, not only for the damage which has been caused by his own act, but also for that which is caused by the act of persons for whom he ought to answer, or for things which are under his control. The father and the mother, after the death of her husband, are responsible for the damage caused by their infant children living with them; masters and employers for the damage caused by their domestic servants and workmen in the functions in which they have employed them; schoolmasters and artisans for the damage caused by their pupils and apprentices during the time that they are under their supervision. The above responsibility exists unless the father and mother, schoolmaster and artisan, prove that they have not been able to hinder the act which has given rise to the responsibility. This defence is not open to masters and employers."

Modern German Law.—It will be seen that there was a considerable difference between the rule of German Common Law and that of the Code Civil. Under the former the master's liability only existed where it was proved that he had been careless in his choice, whilst under the latter the liability was absolute for all acts committed by the servant within the

[1] Part i., title 6, §§ 60, 65.

[2] Prussian Railway Law, 1838; Austrian Law, 1869; German Law, 1871; Swiss Law, 1875.

scope of his employment; but the change made by the Railway Laws had removed one large class of employers from the operation of the Code. The new Imperial Code of 1896 by Art. 831 has now extended the masters' liability by shifting the burden of proof, and rendering them liable unless they can prove that they have exercised due care in choosing their servants. The trend of legislation in Germany has been all towards the increase of the masters' liability, and judicial decisions in Austria are bringing about a state of things which can no longer be made to equate with the long prevailing trend of *culpa in eligendo*.

The subjective basis of liability has, in short, been found insufficient for modern demands, and could not be appealed to in order to justify the modern extension of liability to corporations.

Alleged Reasons for Liability.—The reasons given for the master's liability in the English Common Law afford, says Mr. Justice O. W. Holmes, a striking example of the very common phenomena that the customs of a primitive time often established a rule which remains whilst the reasons for its original imposition have been forgotten. "Some ground of policy is thought of which seems to explain it, and to reconcile it with the present state of things. . . . The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received."[1] This remark is as true in its application to continental law as to the Common Law, and it contains a sound warning against endeavouring to construct an answer to the question, What is the reason for the existence of this rule of liability and for its extension, which shall apply universally, irrespective of time and place.

1. "**Culpa in eligendo.**"—The reason given by the German lawyers was, and to some extent is, this: the master has been negligent in choosing his servant, he has made a bad choice, others have suffered, and he must answer for his carelessness. This was the basis of the Germanic Codes, and it is urged by Demolobe and Laurent[2] that this was also the view of the Code Civil, though their view is not generally accepted to-day. The same view has also been advanced in England.[3] But proof of the exercise of the greatest care in making the selection is of no avail under the Code Civil, though it appears that such a defence is good under the new German Code (Art. 831[4]), and possibly in Austria, under the newer development of the law at the hand of the judges.

2. "**Culpa in inspiciendo.**"—Admitting that the servant had come equipped with an excellent "character," and yet causes an injury to a third person, it is contended that the master is liable by reason of not having exercised

[1] *Common Law*, p. 5.

[2] *Principes de Droit civil*, vol. xx. §570.

[3] "Because strangers had no hand in the choice."—Bramwell B. in *Swainson* v. *N.E.R. Co.* (L.R. 2 Ex. Div. 341).

[4] Cf. also Art. 829.

due oversight. This view is maintained for French law by Dalloz, Sourdat, Larombière, Baudry, Sainctlette, and Willems,[1] and is admitted in some cases of absolute liability imposed by the Germanic laws "if the duty of surveillance is imposed with the object of preventing injuries to a third person by the person so subjected."[2]

But there are many cases in which a servant is necessarily left to do a class of acts without supervision—in fact, the business of life could not be carried on otherwise. This theory of want of proper supervision must be excluded as a rational basis of the rule under modern conditions.

3. "**Ubi Emolumentum.**"—It is argued that as the servant was working for his master, who takes the profits of his labour, he must also bear the losses which are caused by the servant.[3] This is amongst the reasons advanced by the framers of the Code Civil, "N'est ce pas en effet le service dont le maître profite, qui a produit le mal qu'on le condamne à réparer?" Lord Brougham, in *Duncan v. Findlater*,[4] uses similar language, and Dr. Steinbach says it is the principle which underlies the modern development in Austria, and the insurance legislation of that country and Germany is but another aspect of the same principle.

4. **Solvent defendant.**—"There ought to be a remedy against some person capable of paying damages to those injured," said Willes J. in *Limpus* v. *London General Omnibus Company*,[5] and this feeling is expressed by more than one German writer on this question; this, and the fact that while it is often difficult to affix the blame to a particular wrong-doer, the employer is easily ascertainable, affords a protection to the public. The former is, however, not a very conclusive reason, for it cannot be said to be a function of the State to provide injured plaintiffs with solvent defendants. The State provides a remedy for breach of a right, and there is always the action against the actual wrong-doer.

5. **Railways.**—There is a more conclusive reason given by the German Legislature in 1871 in passing the Railway Law for the Empire. "The greatness of the danger connected with railway undertakings, and the confidence which the public is bound to repose in them, imposes on them the greatest degree of liability." This is especially true of railway companies, and it has been extended to other large undertakings. The growth of modern commercial undertakings by means of joint-stock companies, in the carrying on of which the individual has become almost merged in the concern, has been a factor of much importance in the modern development.

[1] Sainctlette, *De la Responsabilité*, p. 126; Willems, *Sur la Responsabilité civile*, p. 137.

[2] *Denkschrift zum Entwurf eines Bürgerlichen Gesetzbuchs*, p. 100.

[3] Steinbach, *Die Grundsätze des heutigen Rechtes über den Ersatz von Vermögensschäden*, p. 61.

[4] "By employing him I set the whole thing in motion, and what he does for my benefit, and under my direction, I am responsible for the consequences of the doing of it" (6 C. & F. 910).

[5] 1 H. & C. 506.

German and Austrian law distinguish between great undertakings, such as railways and mining, and smaller businesses; in the former the employer is absolutely liable, as in English and French law; in the latter only conditionally. What is the reason for this distinction? It is when approaching this question that foreign jurists take their stand on ground which is familiar to English lawyers. The State, which allows the existence of great undertakings, demands in the interest of the public that all injuries caused in carrying them on should fall on the business, and form part of the common cost of the working. To make one of the employees liable for injuries caused in the work would be an injustice, not because the employer is, for example, a railway company and the wrong-doer a signalman, and therefore not worth suing, but because such businesses carry risks which are inevitable, and those who undertake them must be prepared to bear the burdens as well as reap the profits.[1]

The language used in this connection sometimes assumes the form of metaphor—a very dangerous form for legal purposes. The frequent reference to workmen as "machines" and "tools" has the effect of concealing the great difference between inanimate engines and volitional human beings.

Dr. Steinbach, of Vienna, adopts a line of argument with reference to modern Austrian developments which is very similar to that stated by Sir F. Pollock. The undertaking must, he says, be looked at as a whole, and in the great businesses which the State permits a degree of responsibility is imposed on the undertakers proportionate to the risks. Third persons brought into contact with them find themselves in an almost powerless condition. Feeling themselves to be so, they, through the medium of the Legislature, for their own protection impose on these undertakings an absolute liability for everything they may do. When a state of things producing the liability of extraordinary and unusual danger exists, extraordinary and unusual obligations must be imposed. That liability arises in other cases from circumstances which are not under the direct control of the person liable, is seen in connection with the law of real property and in the liability of the owner of animals.[2] By analogy to these cases (for the employer's undertaking is his property), he must answer for the injuries caused by his bringing about a state of things which may be the source of danger for others.

Public Policy.—This liability may be based on that broad and elastic expression, "public policy," or in other words "general expediency." The term is admittedly a vague one, and means different things under different circumstances, at different times and in different places, but under such

[1] Loening, *Die Haftung des Staates aus rechtswidrigen Handlungen seiner Beamten*, p. 89.

[2] "The owner of a building is responsible for the damage caused by its fall, if it happen by reason of the fault of the maintenance, or by the fault of construction" (Code Civil, Art. 1386; Swiss Code, Art. 671; Austrian Code, Art. 342; Italian Code, Art. 1155).

periphrases as "the development of trade," "the social evolution," "the nature of the case," the principle is met with in numerous continental decisions, and may ultimately lead to the full acceptance in Germanic law of the absolute liability of the Code Civil.

The tendency of modern legislation is all in the direction of increasing rather than diminishing the employer's liability. The changed conditions of labour suggest one reflection.

The old rule of subjective liability of *culpa in eligendo* presumed a freedom of choice on the part of employers of labour of which the modern trades-unionism has to a great extent deprived them. That a man cannot serve two masters whose interests tend to diverge is obvious, and the trades-union development is producing such a divergence. "The time is approaching when workmen will lay down the law for masters and employers. In this state of things, the presumption of negligence on which the rigour of the law is founded will have no more reason for its existence." The prophecy of M. Laurent, made now more than twenty-five years ago, has been amply fulfilled, and yet the master's liability not only is not diminished, but extended both as regards third persons and the workmen themselves. Will the time come when the maxim, *Respondent superior*, will have a new import, and the law recognise the liability of the new masters? (For an examination of the historical development of the rule of the masters' liability, see Steinbach, *Die Grundsätze des heutigen Rechtes*, etc.; Prof. H. Beaune, *Nouveaux Fragments de Droit et d'Histoire* (pp. 151–190); Higgins, *Employers' Liability and Compensation to Workmen on the Continent*, Chaps. I. and IV.)

PRINCIPAL PROVISIONS OF THE LAWS FOR THE PROTECTION OF LABOURERS IN RESPECT OF THE PERIODS OF THEIR EMPLOYMENT IN THE TEXTILE FACTORIES.

[*Reproduced by the kind permission of the International Association for Labour Legislation, Basle, from the Bulletin of the Association, and translated for the Society by* JULIUS HIRSCHFELD, ESQ., *of Lincoln's Inn.*]

	GERMAN EMPIRE. Trades Act of July 26, 1900.	AUSTRIA. Trades Acts of Dec. 20, 1859; Mar. 15, 1883; Mar. 18, 1885; and Mar. 12, 1897.	BELGIUM. Act of Dec. 13, 1889, and Orders of Dec. 26, 1892, and Nov. 1, 1894.	DENMARK. Factory Act, 1901.	SPAIN. Act of Mar. 13, 1900, and Order, June 9, 1900.	FRANCE. Act of Mar. 30, 1900, and various Decrees.	GREAT BRITAIN. Factory and Workshop Act, 1901, 1 Ed. VII., ch. 22.	ITALY. Act of June 19, 1902.	LUXEMBURG. Act of Dec. 6, 1876, and various Orders.	NORWAY. Act of June 26, 1892; June 21, 1895; July 27, 1899.	NETHERLANDS. Act of May 5, 1889; July 20, 1895; Dec. 31, 1896.	RUSSIA. Trades Act of 1893 and various other Acts and Orders.	SWITZERLAND. Factory Act, Mar. 23, 1877.	SWEDEN. Act of Nov. 18, 1891.	MASSACHUSETTS. c. 508, 1894; c. 494, 1898.	EAST INDIES. Act No. XV. of 1881; Act No. XI. of 1891.
Day Work.																
Number of legally protected categories of persons employed:	3	3	3	2	2	3	2	2	2	2	3	3	2	2	2	2
Minimum age for admittance to employment in factories:	13	14	12	12	10	12–13	12	12	12	12	12	12	14	12	14	9
The first category includes children at the age of . . . years:	13–14	Up to 14	12–14	12, until the end of compulsory education	10–14	12–16	12–14	12–15	12–14	12–14	12–16	12–15	14–16	12–14	14–16	9–14
Actual daily maximum time of employment, hours:	6	Employment prohibited	11¼–12	6	6	10–11	6½ (5 on Saturdays)	11	8	6	11	9	11	6	Regulated only for the week	7
Actual weekly maximum time of employment, hours:	36	Employment prohibited	67½–72	36	36	60–66	32½	66	48	36	66	54	65	36	58	42
The second category includes:	Young persons of 14–16 years	Young persons of 14–16 years.	Young persons of 14–16 years	Young persons from end of compulsory education up to 18 years	Young persons of 14–18 years. Women above 18 years	Young persons of 16–18 years	Women and young persons of 14–18 years	Females over 15 years	Young persons of 14–16 years	14–18 years	Females over 16 years	Females of 15–17 years	All persons employed over 16 years	14–18	Females over 16 years	Females over 14 years
Actual daily maximum time of employment, hours:	10	11	11¼–12	60	66	10–11	10 (5½ on Saturdays)	12	11	10	11	11½	11	10	Regulated only for the week	11
Actual weekly maximum time of employment, hours:	60	54	67½–72	60	66	60–66	55½	66	48	36	66	54	65	36	58	42
The third category includes:	Females over 16 years	Adults over 16 years	Females of 16–21 years	—	—	Females over 15 years	Women and young persons of 14–18 years	Females over 15 years	Young persons of 14–16 years	14–18	Females over 16 years	Young persons of 15–17 years	All persons employed over 16 years	14–18	Females over 16 years	Females over 16 years
Actual daily maximum time of employment, hours:	11	11	11¼–12	—	—	10–11	—	—	—	—	—	11½	—	—	—	—
Actual weekly maximum time of employment, hours:	65	66	67½–72	—	—	60–66	—	—	—	—	—	68	—	—	—	—
Daily maximum time of employment for male adults, hours:	Not regulated	11	Not regulated	Not regulated	Not regulated	10–11	Not regulated	Not regulated	Not regulated	Not regulated	Not regulated	11½	11	Not regulated	Not regulated	Not regulated
Weekly maximum time of employment for male adults, hours:	Not regulated	66	Not regulated	Not regulated	Not regulated	60–66	Not regulated	Not regulated	Not regulated	Not regulated	Not regulated	68	65	Not regulated	Not regulated	Not regulated
Night Work.																
The law defines "night" as the period between:	8·30 p.m. to 5·30 a.m.	8 p.m. to 5 a.m.	9 p.m. to 5 a.m.	8 p.m. to 6 a.m.	7 p.m. to 5 a.m.	9 p.m. to 5 a.m.	9 p.m. to 6 a.m.	8 p.m. to 6 a.m., and 9 p.m. to 5 a.m. respectively	9 p.m. to 5 a.m.	8 p.m. to 6 a.m.	7 p.m. to 5 a.m.	9 p.m. to 5 a.m.	8 p.m. to 5 a.m. or 6 a.m. respectively	8 p.m. to 6 a.m.	10 p.m. to 6 a.m.	8 p.m. to 5 a.m.
Is night employment of children, of young female persons, prohibited?	Yes	Yes	Yes	Yes	For children and young persons up to 18 years	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Is night employment of women prohibited?	Yes	Yes	No	No	No	Yes	Yes	Yes (from 1907)	No	No	Yes	Yes	Yes	No	Yes	Yes
From what age is it allowed for male persons, from the completed age of . . . years?	16	16	16 (12 for women)	18	14 or 18 respectively	18	18 (in special cases, 16)	15	16 (also for females)	18	16	17	18	18	16	14
Sunday and Holiday Rest.																
Number of legal holidays (including Sundays).	60–69 (as fixed by the various States)	52 Sundays	52 days	52 Sundays and the Festival Days of the Established Church	52 Sundays and the Festival Days (only for Categories I. and II.)	52 Sundays and 8 Festival Days, but only for the Categories I.—III., excluding adult men	52 Sundays, 2 Festival Days, and 3 Holidays	52 days	Not regulated	52 Sundays and the Festival Days of the Established Church	52 Sundays and all Festival Days	52 Sundays and 12 Festival Days	52 Sundays, and Festival Days, not exceeding 8, to be fixed cantonally	52 Sundays and the Festival Days of the Established Church	52 Sundays and 7 Festival Days	52 Sundays

[*To face p.* 114.]

THE AUSTRALIAN COMMONWEALTH CONSTITUTION, 1901–2.

[*Contributed by* W. Harrison Moore, Esq., *Professor of Law in the University of Melbourne.*]

Before this paper can be published the Australian Commonwealth will have completed the second year of its life; and the first Parliament of the Commonwealth will have brought to an end its first session. It is proposed to consider some matters arising out of the working of the new Constitution. "Constitutional" questions in such a complex organism may be of very different kinds. There are the relations of the Commonwealth and its law to the Imperial Government and its law. There are the relations of State and Commonwealth, and of the several organs of government amongst which the powers of the Commonwealth are distributed. There are legal questions the determination of which falls within the consideration of Courts of Law; there are other questions of construction, even of the letter of the instrument, which can be determined only by the political departments. Further, outside the law of the Constitution altogether, there are important political relations to be settled by "conventions" either express or inferred from practice, between the several organs, and the settlement of these relations of power will depend not wholly perhaps, not mainly, on legal considerations.

The Establishment of the Commonwealth.—By Royal Proclamation of September 17th, 1900, in accordance with the Commonwealth of Australia Constitution Act, 1900, § III., the colonies of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia were united in a Federal Commonwealth on January 1st, 1901. In pursuance of the same authority, the Queen had, by Letters Patent, on October 29th, 1900, constituted the office of Governor-General and Commander-in-Chief, and had by commission appointed the Earl of Hopetoun thereto. On January 1st, 1901, the Royal Proclamation was read at Sydney, the Governor-General took the prescribed oaths, and thereupon made proclamation that he had assumed the office. The next step was the constitution of the Federal Executive Council, which consisted of nine gentlemen who were to form the first Cabinet. Then the Governor-General proceeded "with the advice of the Federal Executive Council" to establish the following

departments of State—viz., the Department of External Affairs; the Attorney-General's Department; the Department of Home Affairs; the Department of the Treasury; the Department of Trade and Customs; the Department of Defence; the Postmaster-General's Department.

Finally the Governor-General appointed seven members of the Federal Executive Council to administer the departments respectively allotted to them. In accordance with the doctrine of ministerial responsibility, the notifications of these executive acts were signed by Mr. (now Sir) Edmund Barton, who had successfully undertaken the task of forming a Ministry (*Commonwealth of Australia Gazette*, No. 1, January 1st, 1901).

On the establishment of the Commonwealth, the Departments of Customs and Excise in each State became transferred to the Commonwealth Government (s. 69). Under Proclamation of the Governor-General of February 14th and February 20th respectively, the departments of each State for "posts, telegraphs, and telephones" and "naval and military defence," were transferred on March 1st, 1901. Writs were duly issued for a Parliament to be held at Melbourne on May 9th, 1901; and on that day the Parliament was opened by the Duke of Cornwall and York, as Commissioner from the King, under Letters Patent signed by the King.[1]

The Crown and the Governor-General.—In general, the Letters Patent constituting the Governor-General's office follow well-known precedents; and in so doing commit to the Governor-General several powers and duties already committed to that officer by the Constitution. The instructions passed under the Royal Sign Manual and Warrant of even date with the Letters Patent are similar to those given to the Governor-General of Canada. The clause relating to the pardoning power, however, is drawn so as to provide for the exercise of the power by the Governor-General only in regard to offences against the laws of the Commonwealth, the State Governor retaining the power in the case of offences against State laws. As in the case of Canada, the published instructions of the Governor-General do not require him to reserve any class of bills for the Royal assent.

Both the terms of the Letters Patent and the Commission to the Duke of Cornwall and York rest on the assumption of the essentially delegate character of the Governor-General's office, a view which receives support from the reported description of him in the Constitution as the Queen's representative (§§ 2, 61). The Duke of Cornwall's Commission recited that "for certain causes we cannot conveniently be present in our Royal Person in our said Parliament at Melbourne"; and then proceeds to delegate to his Royal Highness full power "in our name to begin and hold the first Parliament of our said Commonwealth of Australia, and to open and declare and cause to be opened and declared the cause of holding the same, and to do everything which for us and by us should therein be done." It should be

[1] The instrument both in substance and in form closely follows the Letters Patent empowering Commissioners to open the Imperial Parliament.

noticed that it is not universally admitted that the Crown can act in person or make a separate delegation of powers whose exercise has in the Act of Parliament creating a new political community been committed to a statutory officer. (See Clements, *The Law of the Canadian Constitution*, p. 143 and pp. 252–3; and Clark, *Studies in Australian Constitutional Law*, pp. 68, 69).

A "constitutional" question in the English sense of the word arose out of a speech made by Lord Hopetoun on January 27th, 1902. Some adverse comment had been made in the press and by public men as to the tardiness of the Commonwealth Government in offering further contingents for service in South Africa. Lord Hopetoun took an opportunity of stating publicity that "the position taken up by Mr. Barton and his colleagues was most freely approved of" by himself, and that he and his Government, after anxious consideration, "were not of opinion that the moment was a favourable one to offer further contingents"; and he added: "Whatever may be the measure of blame, whatever may be the measure of praise, which a calm and dispassionate consideration of this matter may lay at the door of my Government, I, as an honourable man, feel bound to take my share of it." Mr. Reid, the leader of the Opposition, at once submitted a motion to the House of Representatives, earnestly hoping that the course taken by his Excellency would not be regarded as a precedent. In a speech wherein a singularly difficult task was performed with excellent tact and taste, Mr. Reid pointed out that such an identification of the Governor-General with the policy of his Ministers was subversive of the principles alike of ministerial responsibility to the Parliament and the people, and the responsibility of the Governor-General to the Imperial Government alone; that the assumption of responsibility by the representative of the Crown in matters of controversial politics detracted from the rightful authority and dignity of his office, and embarrassed those who might feel it their duty to criticise the action of the Government. The ideal of the office of a Governor, he said, was "that the distinguished person who occupies it shall steer so prudent and impartial a course that he shall equally command the respect and confidence of both of the great political parties in the State. . . . He should always be in such a position that if the vicissitudes of public life called upon him to choose another set of officers, that set of officers would come to his counsels without any embarrassment, and he should feel that he could receive them without the slightest remembrance of expressions or views which placed him in conflict with them. One of the most serious results of expressions of opinion, especially from a representative of the Sovereign so justly popular and so deservedly esteemed by all classes in the community, is that it throws into questions of party politics on one side the weight of an office and of a popularity which should be absent from all political controversies. The more popular the Governor and the more widely esteemed the man, the more embarrassing will it be

if the public, in dealing with their own affairs, should have to reckon with his opinion, or if political parties, in struggling for what they deem to be right, should have to battle against his popularity."[1] The public utterance of the Governor-General was also a breach of constitutional usage in that it involved a disclosure of communications between himself and his Ministers which ought to be treated as confidential and secret. Eventually, after a debate in which there was very general concurrence with the views expressed by the leader of the Opposition, the motion was withdrawn.

The Commonwealth Parliament: Form of Legislation.—The Constitution provides by § 1 that "the legislative power of the Commonwealth shall be vested in a Federal Parliament which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called 'The Parliament' or 'The Parliament of the Commonwealth'; and the specific powers of legislation granted by § 51 and other sections are committed to 'The Parliament.'" The inclusion of the Crown in the legislature of a dependency has the precedent of some Imperial Acts—the British North America Act, 1867, and the Federal Council of Australasia Act, 1885—and the Constitution Acts of several of the Colonies. The practice is a recent one, and in the majority of even the self-governing Colonies the Crown stands above and not within the legislative body. The practice is probably associated with the assumption of the description "Parliament" by the local legislature, an assumption frequently made at the time of the grant of responsible government; and probably, like that term, in no way adds to legal powers.[2] It has recently been suggested by Mr. Justice Inglis Clark, in his *Australian Constitutional Law*, that as colonial legislatures are essentially dependent, and their enactments liable to disallowance as well as subject to review in the Courts, the Crown as a party to colonial legislation is "placed in the undesirable and undignified position of being made a direct party to an invalid and in one sense illegal and unconstitutional act, as well as being made to appear guilty of stultifying itself."

It might be thought that the Constitution having adopted, in regard to the Commonwealth Parliament, the legal theory of the Constitution of the British Parliament, there need have been no difficulty as to the form of its enactments, and that the accustomed formula of enactment would have sufficed. It was considered, however, that the form ought to follow the terms of the grant, and the first Bills introduced to Parliament ascribed the enactments to "the Parliament of the Commonwealth." Subsequently the Government proposed to alter this to "Be it enacted by the King's Most Excellent Majesty, the Senate and the House of Representatives of the Commonwealth of Australia as follows"; and this form was eventually adopted.

[1] Parliamentary Debates, Session 1901-2, p. 9479.

[2] Mr. Jenks in his *Government of Victoria*, however, suggests that the inclusion of the Crown enables the Parliament of Victoria to legislate with the full force of the prerogative.

Senate and House of Representatives.—Far more important questions of form arise on matters relating to finance, and members of the Senate, with keen memories of old contests between Legislative Council and Legislative Assembly in the several Colonies, were on the watch to secure to the Senate the full measure of its powers under the Constitution, and the means of using those powers. The Post and Telegraphs Bill, the bill in which the question of the form of enactment was determined, was introduced into the Senate with clauses of fees and penalties printed in italics, by analogy to a practice in the House of Lords and some of the Legislative Councils. The implication, of course, is that by custom or law such matters are beyond the competence of the chamber in question. The President of the Senate at once took objection to the form, and insisted on the presentation of fees and penalties in the same manner as the rest of the bill, calling attention to s. 53 of the Constitution, whereby laws containing provisions for the imposition of pecuniary penalties or demanding fees for services, or authorising the appropriation of either, are not prohibited from origination in the Senate and to the express provision that "except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws."

An interesting course was pursued with respect to the Supply Bills, and the first Supply Bill had to be withdrawn and the second amended by the House in order to meet the views of the Senate as to constitutional practice. The House of Representatives, in Committee of Supply and of Ways and Means, passed the familiar finance resolutions; and thereupon a Supply Bill was introduced with a preamble similar to that of the like bills in the House of Commons, and reciting the grant by the House of Representatives to the Crown.

Before the bill left the House, the words, "and do therefore most humbly beseech your Majesty that it may be enacted, and," were omitted; on the ground that as the enactment was not that of the Crown alone, but of the King, the Senate, and the House of Representatives, the prayer, proper in England where the Crown is the enacting authority, was inappropriate in the Commonwealth. The words "in Parliament assembled," were added to the enacting part. When the Bill got to the Senate, objection was taken that the estimates and items which had been submitted to and approved by the House formed no part of the Bill; and that in the absence of these particulars, the Senate had no means of requesting amendments if it should see fit to do so (Constitution, § 53). With this contention the Government agreed, and on their suggestion the first exercise of the Senate's power to "request" amendments was on the return of the bill to the House, with a "respectful request that the House of Representatives will so amend the bill, that it may show the items of expenditure comprised in the sums which the bill purports to grant to his Majesty." The House laid aside the bill, and a new bill was introduced containing the items as required.

The bill also omitted the preamble as to the gift, but in conjunction with the enacting words used the expression "for the purpose of appropriating the grant made by the House of Representatives." In the Senate, the Bill was committed with an instruction to the committee to make a request for the omission of the words in question. In the Committee, on clause 1, "There shall and may be issued and applied towards making good the supply granted to his Majesty," it was resolved to request the insertion of the word "hereby," to show that the grant was not by the House alone, but by the Act; and it was resolved also and for the same purpose to request the amendment of the title by the insertion of "grant and" before "apply." In substance, the House agreed to the requests, with the modifications, however, that the recital, instead of being omitted altogether, was altered so as to read: "For the purpose of appropriating the grant *originated in* the House of Representatives." The bill was returned to the Senate, where the amended clauses were agreed to; it was then sent back to the House in which it originated in the usual way, and ultimately received the Royal assent as Act No. 1 of 1901.

Further of Money Bills.—At an early stage in the debates in the House of Representatives on the Tariff, it was decided that a private member might move an increase of the duty proposed by the Government, an important departure from the practice of the House of Commons (May, *Parliamentary Practice*, 10th ed., pp. 532–3).

Legislative Power: "Extra-Territorial Legislation."—In a former paper [1] the writer referred to a question often suggested but hardly decided—of the power of a colonial legislature to make what are loosely called extra-territorial laws; and in the course of the discussions on the Commonwealth Constitution Bill it was pointed out that the bill appeared to grant certain legislative powers inconsistent with the ordinary limitations implied in the case of a "local and territorial legislature." In less than a year after the establishment of the Commonwealth a case came before the Supreme Court of Victoria which would have put this matter in issue if the Court had not found a way to decide the case without passing any opinion on the main question.

The Parliament determined that all vessels engaged in trading between the several parts of the Commonwealth should pay such duty upon stores consumed by them at sea as would be paid if the like commodities were imported for internal consumption; and accordingly provisions were inserted in the Customs Act, 1901, to prevent evasion. By s. 192, it was enacted that "no fastening, lock, mark, or seal placed by an officer upon any goods, or upon any door, hatchway, opening, or place for the purpose of securing any stores upon any ship which has arrived in any port from parts beyond the sea, and which is bound to any other port within the Commonwealth, shall be opened, altered, broken, or erased, except by authority; and if any ship enters any port with any such fastening lock, mark, or seal opened, altered, broken, or

[1] Journal, N.S., vol. ii. pp. 276, 280-81.

erased, contrary to this section, the master shall be guilty of an offence against this Act," and liable to a penalty of £100.

This enactment was greatly resented by the companies trading to Australia from abroad, and in the case of German ships diplomatic protests were made against the exercise of authority by the Customs officers. The English companies at once took steps to test the validity of the legislation. The *Oceana*, one of the ships of the P. & O. Steamship Company, left Sydney on her return to London with passengers, mails, and cargo, and her stores were sealed by the Customs officer under the Act. When on the high seas and beyond territorial limits, the seals were broken without the authority of any Customs officer, and the vessel entered the port of Melbourne with her seals broken.

The Minister of Customs then took proceedings against the master for the penalty prescribed in the Act; and the facts being agreed, the only question before the Supreme Court of Victoria was whether in point of law the offence had been constituted. This depended on whether s. 192 was *intra vires* if, as a matter of construction, it applied where the seals had been broken outside territorial waters. At the argument,[1] counsel for the plaintiff took a preliminary objection that the Court was not competent to entertain any question as to the powers of Parliament, except so far as it might appear that there was a conflict of the enactments of different legislative bodies—as of the Imperial and a colonial legislature, or as of the Commonwealth and a State Legislature. In such a case, where the enactments were so inconsistent that they could not stand together, the Act of the subordinate legislature must give way to that of the paramount legislature, as is provided in the Colonial Laws Validity Act, 1865, § 2, and in the Commonwealth Constitution, 1900, § 109.

For this contention no authority could be found, but reliance was put on the doctrine that the Courts cannot review the action of the Imperial Parliament, and on the judicial declaration of the plenitude of the power of a colonial legislature, and its likeness to that of the Imperial Parliament; and the argument of counsel was supported by some *dicta* of colonial judges, and particularly of judges of the Supreme Court of Victoria. It was pressed upon the Court that if a colonial legislature attempted to act in excess of the powers committed to it, the proper tribunal of review was not the Courts in their judicial capacity, but the Crown in virtue of its power to disallow any legislation of the colonial legislature. For the defendant, it was answered that the only power which the Commonwealth Parliament possessed was what had been committed to it by the Constitution; that only Acts made under and in accordance with the Constitution were laws; and that it was therefore necessary in all cases to see that this Parliament of limited powers had acted within its authority. It was pointed out that s. V. of the Imperial Act, in declaring that Commonwealth laws should be binding on State Courts, expressly

[1] *Kingston* v. *Gadd*, 1901, 27 V.L.R. 418.

spoke of "laws made by the Parliament of the Commonwealth *under the Constitution*"; but this was met by a contention of the plaintiff's counsel that in this case the Court was acting, not as a State Court, but under powers expressly committed to it by the Act of the Commonwealth Parliament, and was therefore a Court of federal jurisdiction.

The Court disposed of the point very shortly, holding that the power of the Commonwealth Parliament being a delegated power bestowed by the paramount authority—the Imperial Parliament—the Courts before enforcing a Commonwealth Act must investigate and determine whether or not that Act was one which was within the powers bestowed on the legislature; and Holroyd J. spoke of the proposition advanced by counsel for the plaintiff as one which he hoped would not find acceptance with any judge. It could hardly have been supposed that the Court would decide otherwise; and it is satisfactory to have at an early stage in the history of the Commonwealth so emphatic a pronouncement on a question as to which in the early history of the United States there was not a little difficulty and doubt. On the main question in the case it was argued by the defendant that s. V. of the Constitution Act, 1900, by express provision limited the operation of the Commonwealth legislation to ships whose first ports of destination were in the Commonwealth, and that as this ship was not of that class, the Commonwealth Legislature could not directly pass an Act which should be in force on board her outside territorial waters. The powers conferred by the Constitution were only as to acts and things within the territorial limits of the Commonwealth; and if the Legislature had no power to levy a tax outside its territorial limits directly, it had no power to achieve its object indirectly by imposing a penalty upon entering the port. In accordance with the decision of the Judicial Committee in *McLeod* v. *A.-G. for New South Wales*,[1] § 192 of the Customs Act must be construed as applicable only to acts done within the territorial limits of the Commonwealth; and the seals in this case having been admittedly broken outside those limits, there was no offence. For the plaintiff it was argued that the Constitution itself disclosed in a number of cases the intention of the Imperial Parliament to confer powers over a number of non-territorial matters, as "fisheries beyond territorial waters," "the relations of the Commonwealth with the islands of the Pacific," "trade and commerce with other countries and among the States," including navigation and shipping, and "external affairs." Further, the very nature of customs legislation required that to make it effective authority should be exercisable in respect to matters done and happening beyond territorial limits. Finally, it was argued that the gist of the offence was *entering* the port with seals broken, and that therefore the substance of the offence was an act done not without but within territorial waters.

It was upon this last ground that the Court decided the case in the plaintiff's favour. Williams J. pointed out that the object of the enactment was

[1] 1891, A.C. 455.

"taxation" and to prevent the evasion of taxation; in furtherance of that object the law made it an offence to enter with the seals broken except by authority; and he was clearly of opinion that the Parliament had power so to legislate. Holroyd J. said: "The essence of the offence is bringing the ship into port after the prohibition has been violated, no matter where or when the violation occurred." He declared emphatically that with the motive of the enactment the Court was not concerned. Hood J. concurred, and observed: "It was argued that this is an attempt to tax persons or goods not subject to the local laws. If indeed it were an attempt to tax British goods on a British vessel on the high seas either directly or indirectly, I would say that it would fail." The result is that the Court avoided a direct determination of the question whether an Act of the Commonwealth may be *ultra vires* as dealing with matters extra-territorial. The case is under appeal, and this is not the time for a full discussion of the subject. But if the *ratio decidendi* is good, the local and territorial limitation of power can be avoided with a very little ingenuity and care. As was pointed out in the judgment, colonial legislatures have from time to time prohibited persons from entering on account of acts done or things suffered abroad, as where they have prohibited under penalty the entry of persons convicted abroad of crime; and in addition to the powers over "taxation" and "trade and commerce with other countries" committed to the Commonwealth Parliament, is that over "immigration and emigration."

It has long seemed to the writer that the doctrine of the territorial restraint on colonial legislatures was one which was so unsatisfactory that it might be permitted to doubt whether it was really sound. One finds two distinct ambiguities in use in connection with the matter. When a colonial legislature is spoken of as a "local and territorial" legislature merely, the speaker may mean, and commonly does, that while the Imperial Parliament may make laws which are actually operative and in force in every part of the Empire so as to be a paramount law in every such part, a colonial legislature has no power to impose its laws upon any territory other than its own, or to claim their recognition there upon other grounds than those which belong to private international law. That, of course, is so, and in no way distinguishes a colonial legislature from a foreign legislature which, however sovereign its powers may be within its own dominions, is "local and territorial" in the sense that its authority does not extend into the British Empire and make its acts part of the law of the land. As a rule of construction, the maxim, *Extra territorium jus dicenti impune non paretur*, is in use in English Courts for their own guidance, but is of course over-ridden by any clear indication of the intention of Parliament to make its laws relate to persons, things, or acts abroad. When the rule is applied to the colonies, however, and judicial observations upon the rule in relation to Imperial Acts are applied to colonial Acts (as in *McLeod* v. *A.-G. for New South Wales*, 1891, A.C. 455, where the observations of the Court in *Jefferys* v. *Boosey*

4 H.L. Cas. 815, are cited in support of the opinion of the Judicial Committee), the rule alters its character and is treated as one binding the legislature itself, and sanctioned by the duty of the Courts of the colony to refuse to enforce an Act made in contravention of the rule. This, of course, is not merely a different application of the doctrine, but is a distinct doctrine.

The other ambiguity which has been referred to is connected with that which has just been considered, and arises from the use in different senses of the terms describing the extent of the operation of laws. It has been pointed out that (save in the very few cases in which such a power has been expressly conferred by the Imperial Parliament) a colonial legislature cannot make its laws "operate in" or "extend to" another colony or place so as to be of authority there; but it is quite another thing to say that it cannot extend its laws so as to make them operate in its own territory in respect to persons, things, or acts outside; and it is notorious, of course, that in many cases it does so without any question. The fact that both "operations" are within the power of the Imperial Parliament, and that it is sometimes difficult to determine which is intended, adds of course to the confusion. This has some bearing upon an argument of the defendants in *Kingston* v. *Gadd*. It has been noticed that counsel relied on § V. of the Commonwealth Act, 1900, whereby "the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth"; and it was contended that as the *Oceana* was not in this class, the Commonwealth Parliament could not make laws in relation to her acts done beyond territorial waters. It is submitted that this contention is unsound. § V. in the first place is clearly a clause granting power, and not in restraint of power, and could hardly be used to cut down any powers which might be given in § 51. The effect of § V., it is submitted, is to extend the territorial power in the first sense in which that term has been used. Ships which fall within the description are as much within the territorial jurisdiction of the Commonwealth as is New South Wales or Victoria, its laws will be their laws without specific description, and may be executed by Commonwealth officers upon them, on the high seas. The Courts of all parts of the British dominions also will have to take notice that the law of such ships is the Commonwealth law and no other. But it is surely not to be inferred from this that the Commonwealth Parliament may not make a law on navigation and shipping except with respect to vessels falling within the class mentioned in § V.

Commonwealth and State.—The enthusiasm which marked the establishment of the union was succeeded by not a little jealousy and friction between the Governments and Parliaments of Commonwealth and State. Into this, save so far as it raised questions of legal or constitutional interest, it is not proposed to enter. There was some anxiety on the part of State Ministers that in their own State they should be accorded precedence next after the

Prime Minister of the Commonwealth and before other Federal Ministers. There was some soreness amongst the State Premiers that the invitations to the Coronation put them on a different footing from the Prime Minister of the Commonwealth, and the analogy of the Premiers of the provinces in Canada was not readily accepted, inasmuch as the character of Australian Federation differs from that of Canada. Some discussion also arose as to the recommendation for honours. Formerly such recommendations were of course made to the Crown by the Governor of a Colony, and it became understood that for the future the right of recommendation would be exercised by the Governor-General alone. This led to a not unnatural fear that State politicians and State services might be overlooked. Eventually it was stated—but not officially—that the Governor-General will make recommendations on his own motion or on such suggestion as he thinks fit; and that the State Governors will also make recommendations to the Crown, but will be required to send to the Governor-General a list of persons so recommended.

A common vehicle for the mutual jealousy of Commonwealth and State has been found in the Electoral Acts passed by several States disqualifying members of the Commonwealth Parliament not merely for membership of, but for candidature for the State Parliament. The Commonwealth Parliament has retaliated; and the underlying principle of the legislation of both has been aptly described as the principle of self-preservation. A suggestion by the Attorney-General for South Australia that the provision in the Commonwealth Act is *ultra vires*, as the power of the Parliament under §§ 16 and 34 of the Constitution to prescribe qualifications does not include a power to impose disqualifications, does not appear to be well founded.

State Governors and the Governor-General of the Commonwealth.—The question of the respective powers of State and Commonwealth depend, of course, not merely on the matters within the sphere of their several legislative organs—the Parliaments—but also upon the powers committed by the Crown or the Imperial Parliament to the depositary of their executive power—the Governor or the Governor-General. Cases have already occurred in which some difficulty has arisen. With unimportant exceptions an essential principle of Federal Government has been that the Federal State should be to the world one people, and that the complexity of the Government should be an internal not an external matter. In the case of Australia a principal object of federation was to enable her to speak with a single voice in her dealings with the Home Government; and in the Draft Bill of 1891 it was expressly provided that the correspondence of the several State Governments with the Home Government should be carried on through the Governor-General.

In the Convention of 1897-8, however, this provision was abandoned as inimical to the autonomy of the States; and it was considered that the purposes of the Union were sufficiently attained by the assignment to the

Commonwealth Parliament of such matters as were of general concern, or in which the policy of Australia was likely to affect Imperial interest. Accordingly, legislative power was granted to the Commonwealth Parliament over "naturalisation and aliens," "immigration and emigration," "influx of criminals," "the relations of the Commonwealth with the islands of the Pacific," and generally "external affairs." The chapter of the Constitution on the judicature provides also that the High Court of Australia shall have original jurisdiction in all matters arising under any treaty or affecting consuls or other representatives of other countries. But the legislative power is not exclusive; and while the jurisdiction of the High Court may be made exclusive by Parliament, the Court is not yet created. In substance the Constitution is a distribution of legislative powers, the executive power being treated as ancillary thereto. In the heads of legislative power referred to, the Constitution accepts the principle that so far as legislation is necessary to give effect to Australian relations with the outside world, the Commonwealth Parliament shall have full power. As to executive power, however, apart from the few administrative departments of the States which are specifically transferred or may be taken over (defence; customs and excise; posts and telegraphs; light-houses, lightships, beacons, and buoys; and quarantine), the power of the Commonwealth is merely declared to "extend to the execution and maintenance of this Constitution and of the laws of the Commonwealth." Such a method of distribution is apt enough when the matters dealt with are such as come within the sphere of government only when brought there by legislative action. But external relations are in general outside the sphere of legislation; they are commonly settled by negotiation, and the methods used for their determination are essentially those which are available to the executive rather than the legislative organ. The ordinary processes of government are reversed; the question of policy is determined by the executive, and it is the legislative action which is ancillary.

The Federal Government from the first assumed that external affairs as a whole, and not merely the execution of federal legislation thereon, were under their control; and one of the seven departments of State established on the day of the foundation of the Commonwealth was the Department of External Affairs, the importance of which was evinced by the fact that its portfolio was taken by the Prime Minister himself. Very recently the assumption of the Federal Government has been challenged by the State of South Australia. The Netherlands Government complained to the Foreign Office that in breach of the Consular Convention of 1856 between Great Britain and the Netherlands, the South Australian Government refused to grant the assistance of the law in "arresting and sending back seaman who leave without permission vessels of the nationality to which they belong." The Secretary for the Colonies communicated with the Federal Government and requested them to investigate the matter; and thereupon the Premier of South Australia protested against what he

regarded as a violation of the constitutional rights of his State. Declaring himself perfectly willing to satisfy the Secretary of State, he declined to undertake or permit State officers to undertake any investigation at the instance of the Commonwealth Government, whose power over the matter, in the absence of Commonwealth legislation, he entirely denied. To satisfy the demand, he contended, would be to surrender the principle of State autonomy, and to reduce the State in all its relations with the Home Government to a position of mere dependency on the Commonwealth, a position which was abandoned when the clause of the Draft Bill of 1891 already referred to was struck out by the Convention of 1897. The Commonwealth Government, on the other hand, contended that the whole spirit of the Union makes the external relations of every State a matter of Commonwealth concern; that hence the control of the Commonwealth executive arises from the very nature of the Union, and is not a mere incident of the exercise of legislative power by the Commonwealth. This is a far-reaching and at first sight startling contention; it must go the full length of allowing the Commonwealth a determining voice in regard to the Crown's power of refusing assent to or disallowing State laws which bear upon external relations; and of course its tendency is to supersede the direct relations of the Home Government with the State Governments save in minor matters. But if the aspiration of an "Australian nation," of "one people one destiny," is to be fulfilled, it is hard to see how the General Government can permit any organisation within its territory to have a distinct "foreign policy," to involve the whole by its relations with either the Home Government or foreign States, or to be controlled in its acts by a political superior external to the Commonwealth itself. The problem is from its nature hardly to be determined by any tribunal; it belongs to the class of matters in which the rule must be settled by the practice of the political departments. It serves to show that even the most elaborate written constitution has to be supplemented by conventions or understandings outside the law; and it is not too much to say that the understanding come to on this matter, whatever it may be, will have a most important influence upon the life of the Commonwealth.

Another question as to the proper Government for the exercise of particular powers is likely to cause some difficulty. Several Imperial Acts in force in British possessions confer powers upon the Governor or the legislature of such possessions; and where a dual government exists, the question arises—by which authority is the power exercisable.[1] Some of the Acts in question (and now the Interpretation Act, 1889, generally) provide that where there are several parts of the British dominions under both a central and a local legislature, the several parts under the central legislature shall be deemed one colony; while one Act at least—the Territorial Waters

[1] The matter is briefly discussed by the writer in his *Constitution of the Commonwealth of Australia*, pp. 291–3.

Jurisdiction Act, 1878—expressly makes the powers bestowed thereby exercisable by either the central or local authority.

The case *In re Gerhard*[1] which was before the Supreme Court of Victoria in 1901 in three phases, illustrates some of the difficulties in their application of the law of extradition to the Commonwealth, and raises incidentally some other points of general interest. Gerhard was apprehended on September 6th, on the warrant of a Victorian police magistrate, at the instance of the Swiss Consul at Melbourne, on an information charging him with an offence against the bankruptcy law of Switzerland. The prisoner was brought before the police magistrate on September 13th, and remanded for twenty-eight days. On September 16th, the Swiss Consul wrote to the Lieutenant-Governor of Victoria asking him to ratify the proceedings taken for the extradition of Gerhard, and on September 18th the Lieutenant-Governor gave his written consent to the proceedings. A writ of *habeas corpus* was obtained, and on the return to the writ, counsel for the prisoner contended that on the establishment of the Commonwealth the several States ceased to be "British possessions" within the meaning of the Extradition Act, which by § 26 provided that "all colonies, plantations, settlements and territories under one legislature as hereinafter defined are deemed to be one British possession," and that "the term legislature means any person or persons who can exercise legislative authority in a British possession, and where there are local legislatures as well as a central legislature, means the central legislature only." Therefore it was the Commonwealth which was a British possession under the Act, and if applicable there, it was the Governor-General and not the State Governor who was the proper person to act in the matter. It was further argued that as the Act had not been applied to the Commonwealth of Australia by Order in Council, it was not in force there at all. Finally, it was contended that the Act could not operate because there was no insolvency law of Australia.

On these arguments, it was held by A Beckett J. that, though there might have been considerable difficulties if the Act had been applied to Victoria after federation, there was not such difficulty in regard to Acts applied before federation. It was part of the law in Victoria at the establishment of the Commonwealth, and such laws did not cease to operate when the Commonwealth came into existence. "Victoria retained all the machinery of government necessary for proceedings under the Extradition Act, and I hold that the Act, which clearly existed before federation, still extends to it." Subsequently (*In re Gerhard*, No. 2, 27 V.L.R. 484) the prisoner was discharged on the ground that sufficient evidence to justify his committal had not been presented within two months of his apprehension, the learned judge holding that in a treaty "two months" meant lunar months, not calendar months. (His attention was not called to *In re Bluhm*, which assumes the contrary.) Gerhard was then re-arrested,

[1] 27 V.L.R. 244, (No. 2) 484, (No. 3) 655.

and on this occasion the return to the writ showed that he was in custody under the warrant of a Victorian State magistrate issued in pursuance of an order from the Governor-General of the Commonwealth on the requisition of the Swiss Consul.

Several questions were raised in the argument. It was contended that the enlargement under the earlier writ of *habeas corpus* was under the *Habeas Corpus* Act a protection against any subsequent imprisonment or commitment for the same offence; and on this Holroyd J. held[1] that "the word *offence* must be limited to an offence cognisable by a Court in some part of his Majesty's dominions, and so far as the State of Victoria is concerned, by a Court within the State—an offence which can be tried and determined here"; and that as the offence which Gerhard had been accused of committing in Switzerland was not one that could be tried and determined in Victoria, the case was in Victoria outside the protection of the Statute. But on another point the prisoner was successful. The committing magistrate derived his powers not directly from the Imperial Act, but from a Victorian Statute of 1877 passed under the power of auxiliary legislation conferred by the Imperial Act on colonial legislatures; and it was contended that the authority of the Governor-General, supposing that it existed, could not be exercised through a State officer whose only power was derived from the State Act. If the Victorian magistrate was competent to act, it must be in conjunction with the State Governor; if the Governor-General was the proper "Governor" to act, he must act either alone or through some authority constituted by Commonwealth legislation. Holroyd J. pointed out that if the word "Governor" in the Extradition Act, 1870, could be interpreted so as to include the "Governor-General," not merely was the requisition properly addressed to him by the Swiss Consul, but he had jurisdiction to issue his order to the police magistrate as part of the powers exercised by a Secretary of State in England (§ 17 [2]), and he was of opinion that the police magistrate in obeying the order would have acted within the powers conferred on police magistrates in Victoria by the Victorian Act. But he considered that the term "Governor" could not be so interpreted. When the Act was applied to the Australian colonies, "Governor" could only mean the Governor of the several colonies in Australia; and when the Victorian Parliament legislated as to the powers of police magistrates, they could only have meant the Governor of Victoria as the person whose orders the police magistrate would have to obey. The meaning of the term "Governor" could not be altered in that connection except by the Imperial Parliament or the Parliament of the Commonwealth, if the Commonwealth Parliament had power to legislate on the subject.

It is clear that the judgment of Holroyd J. carries the matter a good deal further than that of A Beckett J.; that learned judge merely held that the powers of the State authorities did not cease; Holroyd J. determined

[1] 27 V.L.R. 655.

that the powers under the Act were at present exercisable exclusively by the State authorities; his judgment appears to rest not on the wrongful co-operation of the Commonwealth Governor-General and State magistrate, but on the incapacity of the Governor-General to exercise any power under the Act which, when it came into operation in the Colony, vested the power once and for all in the State Governor. This leaves open the question whether the Governor-General would not be the proper person to exercise the powers of the Extradition Act in cases where that Act is applied to Australia after the formation of the Commonwealth. It must be remembered that this Act is one which is not put into general operation by Order in Council, but is successively applied in respect to such foreign States as from time to time make extradition treaties with the Crown. If any date is to be taken as fixing the application of the interpretation section of the Act of 1870, it would seem reasonable and convenient to take the date at which the Act came into operation—viz., August 9th, 1870—and not the various dates of its several applications.

State and Commonwealth Jurisdiction.—In two cases the Courts have held that the Constitution differs from the American Constitution, on which it is generally modelled, in important points. In the United States it has been held that places over which Congress has the sole legislative power are in all other respects exclusively under the federal authority, and are for all purposes of government to be treated as outside of the State to which they belonged. Therefore, if a crime be committed in such a place it is justiciable only by the Federal Courts (*U.S.* v. *Cornell*, 2 Mason 91; *Fort Leavenworth Railroad Company* v. *Lowe*, 114 U.S. 525; *Houston* v. *Moore*, 5 Wheaton 1).

The Commonwealth Constitution provides (§ 52 [1]) that the Parliament of the Commonwealth shall have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to all places acquired for public purposes. On March 1st, 1901, the Postal Department of New South Wales was transferred to the Commonwealth, and thereupon all property used exclusively in connection with the department became vested in the Commonwealth (§ 85 [1]). The Armidale post office was accordingly vested in the Commonwealth when one Bamford was charged with having stolen therefrom certain moneys. Bamford was presented for trial at the State Assizes at Armidale, and pleaded guilty; but the Solicitor-General drew the attention of the Court to the American decisions, and the question of jurisdiction was reserved. Stephen J. was of opinion that there was no substantial difference in this matter between the American and Australian Constitutions, and held that the Post Office was no longer within the territory of New South Wales or subject to its legislation or its Courts. The majority of the Court, however (Owen J. and G. B. Simpson J.), while approving of the reasoning of the United States cases, thought that the Commonwealth Constitution was to be distinguished. S. 108 of the Constitution expressly saved State

laws relating to matters within the power of the Commonwealth, and provided that they should remain in force until altered by the Commonwealth Parliament; and amongst the State laws so preserved were those which created the offence with which the prisoner was charged, and gave jurisdiction to the State tribunals. The Court was evidently impressed with the argument *ab inconvenienti*, and the mischief which would arise from the recognition of what, until the Commonwealth Parliament should establish Courts of federal jurisdiction, would be "little Alsatias" throughout the Commonwealth (*Rex* v. *Bamford*, 1901, New South Wales, 1 State Reports 337).

The other case is *Wollaston* v. *Rex*, determined in 1902 by the Supreme Court of Victoria. It raised the question whether the Victoria Income Tax Act, 1895, imposing a tax on all income derived from personal exertion, applied to the salaries of civil servants in the employment of the Commonwealth Government. In the United States, the doctrine of the Supreme Court in *M'Culloch* v. *State of Maryland*, 4 Wheaton 316, that a State may not impede the Federal Government by imposing any tax upon its instrumentalities, has been applied so as to prevent the Federal or State Governments from levying any tax upon the official salaries of servants of the other. This application has been followed in Canada; and, in the case referred to, it was sought to establish the same doctrine in Australia. The Supreme Court of Victoria, however, considered that a tax falling upon a federal officer in common with other inhabitants of the State, and measured by the amount of his income, including of course his official salary, was not an interference wtth federal instrumentalities, and without disapproving of the general principles laid down in the United States, they declined to follow them in their application to these cases.

From both of these cases—determined by the Supreme Courts of different States—it is clear that the Australian Courts are not going to pay, as by some it was supposed they would pay, an implicit obedience to American cases; and in *Rex* v. *Bamford* we find G. B. Simpson J. citing with approval the remarks of Lord Halsbury, L.C., in *Re Missouri Steamship Company* (L.R. 42 Ch. Div. at p. 330), in regard to the citation of American decisions. Both in the terms of the Commonwealth Constitution and the existence of the Imperial relations, there is abundant reason why we should pause before accepting American cases as final in matters of Australian constitutional law.

THE MOST-FAVOURED-NATION ARTICLE.

[*Contributed by* WALLWYN P. B. SHEPHEARD, ESQ.]

THE subject of the most-favoured-nation article has already been fully treated in a previous number of the Society's journal.[1] But as a Parliamentary paper intituled "The Correspondence with the Russian Government respecting the Interpretation of the Most-Favoured-Nation Clause in connection with the Countervailing Duties on Bounty-Fed Sugar" (Commercial No. 1, 1903) was presented in February last to both Houses of Parliament, it may be proper to recur to the question.

The Anglo-Russian Correspondence.—The existing dispute between His Majesty's Government and that of Russia originated with the Indian Tariff Act (1894) Amendment Act, published in the *Gazette of India Extraordinary* of March 21st, 1899, whereby Russian sugar was subjected on importation into India to a countervailing duty, consequent upon the Council of India deeming that the Russian system of sugar legislation produced a bounty on exportation. Such bounty was denied, as a fact, by the Russian Government, but it is unnecessary to discuss this question of fact, inasmuch as that Government alleges that the imposition without previous negotiation of differential or countervailing duties in the case of countries which enjoyed most-favoured-nation treatment constituted an infringement of that clause in existing treaties, even when those countries granted bounties on exportation to their products. To that view—contained in the despatch of M. Lessar of June 12th, 1899—Lord Salisbury replied in a despatch of July 15th, 1899, that—

> the great extension and development which had taken place in the system of bounties and other analogous expedients constituted a grave menace to British industry and enterprise. Her Majesty's Government were, therefore, not disposed to admit that any Government had the unrestricted right by such means to override the clear intention of the most-favoured-nation clause, which was, that goods should enjoy equality of treatment, but not preferential advantages as compared with goods of the most-favoured nation.
>
> When an artificial preference of such a character was produced by the direct legislative act of a foreign Government which was a party to a most-favoured-nation stipulation, Her Majesty's Government considered that it should be open to

[1] *See* "The Most-Favoured-Nation Article" (contributed by Wallwyn P. B. Shepheard, Esq.) in the *Journal of Comparative Legislation* for December, 1901.

the other contracting party, if such action should seem expedient, to redress the balance of trade which had thus been artificially disturbed. The remedy in such a case lay in the hands of the Government granting the bounty, or by its legislative act producing the artificial stimulus, the discontinuance of which would cause the counteracting measures to be withdrawn.

No variation of the Indian Tariff Act in respect of Russian sugar resulted from this protest of the Russian Government. The dispute, however, was renewed in connection with the International Convention[1] relative to bounties on sugar, which was concluded on March 5th, 1902, at the International Conference held at Brussels by the following Sovereign Powers: Great Britain, Germany, Austria-Hungary, Belgium, Spain, the French Republic, Italy, the Netherlands, and Sweden and Norway.

In a despatch of July 8th, 1902, His Excellency M. de Stael communicated to the British Government a memorandum prepared by the Russian Finance Minister, which, after discussing the Russian sugar legislation as to the disputed fact of the existence of any bounty, stated that—

according to the Convention concluded by the representatives of the above-mentioned Powers, the contracting parties undertook to levy special duties on sugar the produce of countries which granted a bounty on the production or the exportation of sugar (Art. IV.), and to apply a lower tariff to sugar coming from countries which took part in the Convention. In order to avoid any complication with friendly Powers, the Russian Government considered it necessary to make a clear statement of its point of view on this subject before the measures adopted by the above-mentioned Conference came into force.

Russia had concluded Treaties of Commerce with all the Powers which had taken part in the Brussels Conference, in virtue of which treaties Russian products could not be taxed at any other nor at a higher rate than the products of the most-favoured countries. In these treaties this principle of most-favoured-nation treatment was not subject to any limit or any condition. The Russian Government would, consequently, consider the application of a higher tariff to Russian sugar as a violation of the treaties, even if the exportation of sugar were favoured in Russia by bounties, which, as a matter of fact, was not the case.

To put into force the measures adopted by the Brussels Conference against Russia would be a violation of the treaties, even if the treaties contained a clause dealing with the establishment of bounties on exportation.

Lord Lansdowne replied on July 30th, 1902, on the question of interpretation by stating that—

should the Convention be ratified, and should the International Commission find that bounties resulted from the Russian system, His Majesty's Government would have no option but to apply the penal clause to Russian sugars, a course which, as previously stated, they would consider in no wise inconsistent with the stipulations of the Treaty of Commerce between Great Britain and Russia of January 12th, 1859.

[1] Treaty Series No. 7 (1903): International Convention relative to Bounties on Sugar, signed at Brussels March 5th, 1902. (Ratifications deposited at Brussels June 18th, 1902—February 1st, 1903.)

Thereupon the Russian Government, in a memorandum by Baron Graevenitz of September 24th, 1902, discussed the whole question at great length, specifically alleging in respect of the existing Treaty of Commerce with Russia that it

was evident that neither bounties on exportation nor duties on exportation gave, in any case, to the other party the right to impose additional duties any more than they could compel it to grant any sort of bounty. Each country was free either to grant bounties to the products which it exported, or to subject them to export duties. These were merely methods, like many others, which enabled Governments to facilitate their national products being brought to international markets or to retain them in their own country.

The right to the treatment of the most-favoured nation provided for by the treaty in favour of the two contracting parties did not fetter the liberty of either of them with regard to the domestic legislation which they might consider it useful to adopt with a view to develop or encourage national industry. Whatever might be the domestic legislation of the exporting country, the goods of one of the contracting parties could not, as long as the treaty remained in force, be subjected in the territory of the other to the payment of higher duties than those levied on similar goods of another Power. Were it otherwise, the right to most-favoured-nation treatment would be a means of interfering in the domestic legislation of a foreign Power.

Lord Lansdowne on November 20th, 1902, continued the discussion by stating that—

it was necessary first to point out that there was no intention of placing Russian sugar in the British market in a less favourable position than other sugars, for if the exportation of such sugars be stimulated by the legislative action of the countries whence they were derived, they also would receive treatment corresponding to that accorded to the Russian product, which could equally escape such treatment on the withdrawal of the encouragement it now enjoyed. The matter was, therefore, in the hands rather of the Russian than of the British Government.

The correspondence on this important point, so far as it has been officially published, was closed by a *note verbale* of Baron Graevenitz of January 14th, 1903, wherein he stated that—

the wide divergence of views which was revealed by the correspondence hitherto exchanged between the two Governments precluded, it would seem, any chance of a compromise—all the more so as the British Government had declined the offer made by the Imperial Government to submit the matter to arbitration.

Finally the British Government had declared that the penal clause would only be applied to Russian sugar "in the case of the International Commission finding that bounties did result from the Russian system." The question, therefore, must still be considered an open one for the moment, and any further exchange of views should be suspended until the decision of the above-mentioned Commission.

The Present Aspect of the Question.—In the article already referred to

the opinions of the American publicists were fully stated, and it was shown that the American Government had from an early period in the previous century consistently and continuously acted upon those views, and that a discussion thereon arose with this country in 1885. At the present time the American views prevail with the British Government, whilst the previous British views are now more or less represented by those of the Russian Government in the existing dispute as to the interpretation of this treaty article.

In the previous article it was stated, *à propos* of the dispute as to the interpretation between the American and German Governments, that both disputants held in common the opinion that, notwithstanding the most-favoured-nation article, neither Treaty Power was debarred from its right to favour its own domestic productions "by," said the German Ambassador, "duties or bounties"; and "by any internal regulations," said the Attorney-General of the United States, "necessary for the protection of the home industries." This agreement in common constituted, in the writer's opinion, such a *consensus in idem* as seemed to afford the necessary ground to sustain the action of the United States in imposing differential import duties against productions receiving export bounties. He summed up by stating that "the interpretation that both Treaty Powers retained their liberty, notwithstanding this article, to adopt measures necessary to protect their own subjects or citizens, gave as much effect as it seemed possible to give to this treaty engagement, and that such reserved power and liberty enabled, if necessary, either Treaty Power to accord different treatment as between the other Treaty Power and third Powers; but that such variation, being consequent upon acts within the volition of the Power objecting, seemed to be no violation of the most-favoured-nation engagement on the principle of *volenti non fit injuria*."

But does this interpretation, based on the analysis contained in the previous article, hold good when such variation of treatment arises under an international obligation to which the objecting Treaty Power is not a party? In short, has Russia stronger grounds for objection because the British Government is acting under an international engagement entered into whilst the Commercial Treaty with Russia is in force, and for the benefit of all the parties to such engagement, instead of solely in the interests of British subjects and domestic productions? It is submitted that this interpretation still holds good, because it may well be argued that the adhesion of Great Britain to an international engagement is a limitation, rather than an extension, of the exercise of the right, notwithstanding the most-favoured-nation article, to adopt measures for the protection of British subjects. In short, the Russian argument of a right to grant domestic favours brings that Power within the *consensus in idem* which is apparent in the general controversy; and our exercise of that right alone or in association with other Powers seems in either case to raise no valid grounds for objection.

In conclusion, the writer submits that the wording of the most-favoured-nation article simply defines a *modus operandi*, whereby to effectuate a given object and intention—viz., equality, so far as State intervention is concerned, of competing conditions as between all contracting Powers on the markets of the common contracting Power. If any one of those Powers varies in its own favour such competing conditions, has it a right to object to the consequential measures necessary to reinstate the equality of competing conditions intended as the object of the most-favoured-nation article? We think not; and, moreover, although the originating act was that of the exporting and not of the importing country, yet the latter by its acquiescence defeats the object of the most-favoured-nation clause as effectually as any positive act would do.

ELECTRICITY AND ITS RESPONSIBILITIES IN ROMAN-DUTCH LAW.

[*Contributed by* E. A. Whittuck, Esq.]

Tramway and Cable.—The case of *Eastern and South African Telegraph Company* v. *Cape Town Tramway Company*[1] was decided in the spring of last year by the Judicial Committee of the Privy Council in appeal from the Supreme Court of Cape Colony. Its facts briefly summarised are the following: The plaintiffs, the appellants, were proprietors of a submarine cable, which had a landing-place at Cape Town. This cable, laid in 1889, worked satisfactorily till 1896. But in the latter year the respondent tramway company began to propel their cars by means of electricity. Immediately upon this happening the plaintiffs' cable went wrong, becoming so much disturbed while the tramcars were running as to make it impossible to get correct messages by it. There could, indeed, be no doubt that an escape of currents of electricity from the tramway, varying in force with the varying movements of the tramcars, caused the interference with the working of the cable signals. The cable was thereby rendered useless while cars were in movement, but it was not itself materially injured. The plaintiff company suffered for a time considerable loss in consequence, but ultimately, though at much expense, it adopted counteracting means, which prevented the signals being any longer disturbed. It should be added, what is a mixed matter of law and fact, that absence of negligence on the part of the respondent tramway company is assumed in the decision both of the Supreme Court and of the Judicial Committee.

The Courts had to decide whether these circumstances disclosed a good cause of action; a subject involving two distinct questions, since one part of the tramway was worked under statutory powers, while the other was not. In respect of electricity coming from the latter, the question was simply whether the respondents, in doing what they had done, had infringed the Common Law of the Colony, and it is this question alone, and not that of the statutory authority of the company, which concerns us in this article.

Roman-Dutch Law and English Common Law.—The Common Law of Cape Colony, the subject of our enquiry, is, as is well known, not English

[1] 1902, A.C. 381.

Common Law, but the Roman-Dutch law, which the original Dutch settlers brought with them from Holland, one of the countries where Roman law was received. This Dutch law of Roman origin was not superseded after the cession of the colony to the English, and it has extended its influence over South Africa with the different treks of the Boers. It is a system mainly derived from Roman law as formulated by the Emperor Justician, within the limits prescribed by the School of Bologna. But Roman law thus applied was necessarily subject to modifications and extensions, which were introduced through the Canon Law or have been established by custom and statute. In the method of administering it Roman-Dutch law is in striking contrast to that to which English lawyers are accustomed, for its interpretation does not depend on the authority of decided cases but is rather to be gathered from the prevalent opinion of scientific writers.[1] Having, then, to determine the present case according to this system of law, both the Court below and the Judicial Committee came to the conclusion that the respondents were not liable. But these two tribunals were not altogether in agreement as to the grounds of their decision.

The view of the Supreme Court seems to have been (1) that as neither *dolus* nor *culpa* could be imputed to the respondents, no actionable wrong had been committed according to Roman law; (2) that no modification or extension of Roman law had been subsequently made, the principle of *Fletcher* v. *Rylands*, L.R. 1 Ex. 277, never having found its way into Roman-Dutch law.

The Judicial Committee, on the other hand, whose decision was delivered by Lord Robertson, mainly addressed itself to considering whether the English Common Law doctrine of *Fletcher* v. *Rylands* was applicable to the case—*i.e.*, the doctrine that if a person bring on his land something which could not naturally come there, the thing itself being dangerous and likely to do mischief if not kept under proper control, he will be liable for any damage thereby caused, though his act may show no personal wilfulness or negligence. Their lordships decided that the case was not within this Common Law doctrine on the following grounds:—

Storing Electricity and the Doctrine in Fletcher *v.* Rylands.—Although storing electricity, as had been done by the respondent tramway company, is of the kind of things which a man can only do at his peril, the kind of resulting evil, such as is postulated in *Fletcher* v. *Rylands*, was not here present. "In the present case," Lord Robertson said, "neither person nor property was injured (unless the ingenious suggestion of Mr. Bousfield could be entertained that physical injury was done to the paper which was smudged by the eccentric action of the recording apparatus). Certainly

[1] It may perhaps be worth noticing that the collection of Roman-Dutch law books in the library of the Privy Council, which has been very incomplete, is now being considerably augmented under the superintendence of Mr. Hope, the Registrar.

there is here no injury of the same genus or species with the tangible and sensible injuries which have hitherto founded liability on the principle in question, and which have always constituted some interference with the ordinary use of property. Now the kind and degree of interference with the respondent's property is pretty well illustrated by the fact that it can only take place if the cable is constructed without certain precautions, for given the cable as it now is, there is no injury." To ensure the immunity of such an instrument as this cable, is, in the opinion of their lordships, too serious a liability to cast upon neighbours. A man cannot increase the liability of his neighbour by applying his own property to special uses, whether of business or pleasure. On this ground their lordships absolve the respondents from liability. They then proceed to criticise the view taken by the Supreme Court that there is anything in Roman law inconsistent with the principle of *Fletcher* v. *Rylands*. This view, they maintain, is not supported by the texts or decisions, which illustrate the full recognition of the right of an owner freely to use his property for natural purposes, even although loss to his neighbour may result. Nor, on the other hand, does the prominence given to *culpa* in Roman law preclude the reception of the doctrine now under consideration into legal systems founded on the Civil Law. The learned judges, and also Kekewich J. in *National Telephone Company* v. *Baker*,[1] seem to have been inaccurately informed on this point; for as a matter of fact not only is the principle of *Fletcher* v. *Rylands* fully accepted in Scotland, but it had formed part of the law of Scotland before *Fletcher* v. *Rylands* was decided, and the decision in the case has been treated by the Scotch Courts as an authoritative exposition of law common to the two countries.

Unfortunately, at least for the student, their lordships confine themselves to these general remarks on the Roman-Dutch law by which the case is governed. Although they do not approve of the attempt of the Supreme Court to exclude the principle of *Fletcher* v. *Rylands* from Roman-Dutch law, they do not indicate the place in that system where any trace of this principle is to be found, nor do they refer to the opinions of any Dutch commentators on this law, though Van Leeuwen appears to have been cited in the argument.

As to any Redress in Roman Law.—In the absence of any detailed information on the subject from this authoritative source, we are left to enquire for ourselves whether there is any action or germ of an action in Roman law which is appropriate to a case of this kind. On this subject we would venture to make the following remarks: (1) It is clear that the Supreme Court was right in holding, as it seems to have done, that as neither *dolus* nor *culpa* on the part of the respondents could be shown, no *actio ex delicto* could lie against them. Had it been otherwise, the *actio utilis legis aquiliæ*, or *in factum*, might have been available, the electricity having caused *damnum* to the plaintiffs, though not of a tangible kind.

[1] 1893, 2 Ch. 186.

(2) There is no *actio quasi-ex delicto* either in Roman law itself or in any subsequent extension of it which could supply a remedy in this case.

But with this statement a note on the case inserted in a recent number of the *Law Quarterly Review* is somewhat at variance. The note is as follows :—

> The connection with any ground of liability recognised in the classical Roman law does not seem obvious at first sight. We can only guess that its rule may be taken as an extension of the liability *quasi-ex delicto* enforced by the *actio positi aut suspensi*. Yet we had thought that liability *quasi-ex delicto* assumed the existence of *culpa* somewhere, though not necessarily in the defendant. Now this is exactly what the rule in *Fletcher* v. *Rylands* does not. The judgment gives a hint that their lordships were aware of this, but we should have liked a more distinct exposition.

But if the characteristics of the liability enforced by this *actio quasi-ex delicto* be considered, it becomes difficult to regard the guess of its having been thus extended as a happy one. The *actio positi aut suspensi* is one of the *actiones populares*, maintainable by a common informer to recover a penalty on account of something likely to be dangerous to the public having been put in or near a public place. That an action framed in this way for a public object, and not for the protection of private rights, should have become a means of enforcing the principle of *Fletcher* v. *Rylands*, seems improbable in itself, nor is any hint of this having occurred to be found in commentaries on the Civil Law.

Remedy by an "Actio in Rem."—(3) The suggestion we would make is that the action we are looking for is to be found, not among the *actiones in personam*, whether *ex delicto* or *quasi-ex delicto*, but among the *actiones in rem* of Roman law.

Of this latter class of action the one which seems suitable to the kind of case we are considering is the *actio in rem negatoria* or *negativa*. This is a remedy which an owner, or, in its prætorian form, a person occupying the place of an owner, as *emphytenta*, *usufructuarius*, *bonâ-fide* possessor, can maintain against any one claiming a right to interfere with the enjoyment of his property. In the sources of Roman law the *actio negatoria* is almost exclusively employed to protect ownership against the assertion of rights of servitude, and so is opposed to *actio confessoria*, by which a right of servitude is claimed, but it subsequently became a more general form of protection.

The *intentio* of this action contained the denial of the plaintiff that his property was subject to the right asserted—*e.g.*, "si paret Aulo Agerio jus non esse tigni—stillicidii immittendi invito Numerio Negidio." On the vexed question of the burden of proof we need not here dwell, but what is material is, that being an action founded on ownership, the plaintiff need not show that the defendant is *in culpa*, as similarly *mala fides* on the part of the possessor is not a condition of *vindicatio*. The *actio negatoria* would be applicable,

as into her cases, where a right of ejecting injurious or noxious substances on to a neighbour's property was claimed. An owner of property cannot indeed complain of being subject to such an interference if it is of an ordinary or reasonable kind—*e.g.*, he must submit to the inconvenience caused him by a moderate amount of smoke (*fumum non gravem*) from his neighbour's fire, or on account of a party wall being made occasionally damp by a neighbour's use of a bath contiguous to it; but for injuries caused by physical substances transmitted from neighbouring property, which are unusual in character or excessive in amount, liability may arise—*e.g.*, on account of nuisance to neighbours from the smoke of a manufactory, or from a party wall being made constantly damp (*adsidum humorem*) by a neighbour's act, on account of stones cut in a quarry falling on neighbouring land, and for other encroachments of a similar kind.

That the *actio negatoria* might be used in such cases as a remedy by the owner is shown in the following passage of the Digest—D. VIII. 5, 8, 5 (Ulpianus, Ad Edictum):—

> Aristo Cerellio Vitali respondit, non putare se ex taberna casearia fumum in superiora ædificia jure immitti posse, nisi ei rei servitutem talem admittit. Idemque ait, et ex superiore in inferiora non aquam, *non quid aliud* immitti licet: in suo enim alii hactenus facere licet, quatenus nihil in alienum immittat: fumi autem sicut aquæ, esse immissionem: posse igitur superiorem cum inferiore agere, jus illi non esse id ita facere. Alfenum denique scribere ait, posse ita agi, jus illi non esse in suo lapidem cædere, ut in meum fundum fragmenta cadant. Dicit igitur Aristo eum, qui tabernam casearium a Minturnensibus conduxit, a superiore prohiberi posse fumum immittere, sed Minturnenses ei ex conducto teneri: agique sic posse dicit cum oe, qui eum fumum immittat, jus ei non esse fumum immittere quod et ipsum videtur Aristo probare.

The Protection of Ownership.—The protection thus afforded to ownership has been applied in modern systems of Roman law to many new kinds of ejections of a physical kind which come within its principle—and, what particularly concerns us here—both according to the theory and practice of recent Civil Law, injuries caused by the escape of gas and electricity are within it. Our conclusion, then, is that the cable company—the plaintiffs in this case—could have made use of the *actio in rem negatoria*, if the electricity of the tramway company had interfered with them in the ordinary use of their property. But because, as their lordships pointed out, the working of a telegraphic cable is not an ordinary use of property, the protection afforded by this action would not avail them, and the respondent tramway company would be free from liability. From what has been said, it will be seen that Roman law by the *actio negatoria* supplied a means of enforcing liability in cases coming under the principle of *Fletcher* v. *Rylands*, as well as in cases which belong in English law to the head of nuisances.

And as this action is not delictual in character but based on ownership,

so in Roman-Dutch and cognate systems of law liability, according to the doctrine of *Fletcher* v. *Rylands*, would be included under that part of the legal system which treats of restrictions on ownership for the protection of neighbouring owners.

Accordingly we find that the particular injury we have been considering holds this place in that great model of a civil code, the Bürgerliche Gesetzbuch, the jurisprudence of which is mainly derived from Roman law; for though § 906 of the Code does not mention electricity, it evidently comprehends it, in the following terms:—

Der Eigentümer eines Grundstücks kann die Zuführung von Gasen, Dämpfen, Gerüchen, Rauch, Russ, Wärme, Geräusch, Erschütterungen, und ähnliche von einem anderen Grundstück ausgehende Einwirkungen insoweit nicht verbieten, als die Einwirkung die Benutzung seines Grundstücks nicht oder nur unwesentlich beinträchtigt oder durch eine Benutzung des anderen Grundstücks herbeigeführt wird, die nach den örtlichen Verhältnissen bei Grundstücken dieser Lage gewöhnlich ist.

But in the jurisprudence of English law, owing perhaps to the fact that it has very much lost sight of the important distinction between proprietary actions and actions arising from contract and wrong, the doctrine of *Fletcher* v. *Rylands* is treated under the law of tort, where it appears in an anomalous position.

IMMIGRATION RESTRICTION IN AUSTRALIA.

[*Contributed by* EVERARD DIGBY, ESQ.]

Britons' Access to British Soil.—Every spot of British soil may be taken to offer footing to any British subject, and no sham or fanciful obstacles can block the British foot from pressing British soil: the only curtailment of a Briton's right to go where he may choose on British soil is when policy calls for a sacrifice of that right in its entirety or in part for the general good. The interests of a section of the community cannot override this general right; the law will not permit a "boycott" in the interests of a small faction.

The acquisition of new territory by the Empire; the wider development of territory hitherto unprofitable; by improvements in industrial processes; the greater facilities of transit; speed and certainty in mails and telegraph; the increase of population, and the decrease in the productiveness of old settled places; the charm of the unknown and the desire for rapid fortune are influences which continually send crowds of Britons wandering over the face of the globe, seeking the wealth which is denied them at home. All these "vagrom" men, possessing British nationality, wherever they reach British soil, assume that they have, *prima facie*, the right to tread it. They know that one of the principles of British law is that no captious checks shall be allowed to be placed upon a man's industry, nor obstacles be allowed to be put in the way of his earning his living, provided that in so exercising his industrial powers he may not be doing harm to the community in which he may desire to find a place. He will find in most places local laws regulating immigration—laws based on the peculiar conditions of the particular places. Provided that these laws are reasonable, he cannot have any quarrel with them, even when they may be hostile to him.

More particularly it is in a possession which is in process of making, and in which the people are desirous of retaining and continuing the British character, that these restrictions will be found. In early settlement men do not look much to the future, and so all comers are welcome; but it is when generation has succeeded generation, and the permanency

of settlement is realised that colonists begin to check and regulate the classes of settlers who seek to join them in the new land. The Asiatic and African, who ethnologically cannot coalesce with the Caucasian, and whose presence racially would be undesirable, find that legislation is against their entrance. Criminals, inebriates, and paupers, who socially are hostile to the welfare of a colony, find themselves kept outside, as also do persons affected by contagious diseases and those who live by prostitution. A moment's thought given to the above list will satisfy the most casual observer that the members of each of those classes do not possess the qualities which are necessary in order to continue the British character in the people of a colony. There are good reasons, ethnological, social, moral, and economic, for the exclusion of persons of the above classes, and no British subject coming within those classes can have any ground of complaint on the score that the principles of British law have been infringed. All Statutes are to be construed in the light of established principles, and these principles are superior to all Statute Law. It has been laid down in *Æneas Macdonald's Case* (1747, 18 State Trials, 857, Lee) that the character of British nationality is imposed at birth, and not offered for acceptance; so every British subject is *ipso facto* entitled to the free exercise of all the rights attendant on such nationality. This principle must ever be borne in mind when laws purporting to limit those rights have to be construed.

The case of an alien desirous of landing on British soil does not involve any such principle. The local municipal law checking and regulating his admission can alone be applied, and its very words will be conclusive.

The now notorious "Six Hatters" case which occurred in Sydney, bringing into public notice the Commonwealth Immigration Restriction Act, 1 Edward VII., No. 17, 1901, was not satisfactory to the constitutional lawyer, as the application of legal principles was not made, owing to the appearance of that destroyer of precedent—compromise. However, it is interesting in so far as it shows some of the influences that affect social legislation in Australia.

New South Wales: Coloured Labour and Convict Importation.—The course of legislation in New South Wales relating to immigration restriction will be illustrative of the course of similar legislation throughout Australia, culminating in the above Commonwealth Act.

In the year 1840 it was proposed by employers in New South Wales to introduce Indian coolies as labourers. At that time and down to 1849 immigrants consisted mainly of convicts, whose labour in certain instances was let out to the settlers. The then Governor, Sir George Gipps, disapproved of the proposal to import coolies, as they would tend to cause deterioration in the promising settlement. This seems to have had much effect, as the number of coolie labourers never rose to any great proportions.

Owing to a good season in 1847, there was not sufficient labour to do the work of the Colony, and again the settlers looked towards the East to supply the want. The merits of the Chinaman as a labourer were well known, and in 1848 a very large number of Chinese were introduced into the Colony, but against strong protests. The expressions of disapproval to objectionable immigrants were of no use to keep them out. Public opinion, to be of effect, must be condensed into action or Act of Parliament.

In 1849 the public—capital and labour united for the common good—rose, and actively and physically opposed the landing on the shores of New South Wales of certain objectionable immigrants. The ship *Hashemy*, carrying two hundred and twelve convicts, arrived in Port Jackson on June 8th of that year. The political, commercial, and social leaders called the people together at Circular Quay in Sydney, and, after several speeches, it was resolved that no more convicts would be allowed to land in New South Wales. The meeting was successful in what it desired, and the *Hashemy* was the last convict-ship to enter Sydney harbour.

Year after year down to 1861 the Chinese came into New South Wales freely, the discovery of gold in Australia in the early 'fifties proving a great attraction. They became so numerous that they competed with the white man in every branch of labour, living thriftily and saving their winnings, in marked contrast to the white men. Gold-digging became the one great industry which strongly attracted men, and in this industry the white man could not brook the interference of Chinese. At the celebrated Lambing Flat Diggings at Burrangong, New South Wales, in 1861, a serious riot occurred, in which the white diggers rose and attacked the Chinese in their camp at the diggings. The tents and other property of the Chinese were destroyed, and many of the yellow men were seriously injured. So serious was the rising that the Government of the day despatched troops and police to quell the disturbance. The upshot of this riot was the placing on the Statute Book of 25 Vict., No. 3 (1861), by which restrictions were placed on the entrance of Chinese into New South Wales. By s. 3 only one Chinese to each ten tons of the tonnage of all vessels carrying Chinese, was allowed to enter the Colony, and on each a poll-tax of £10 was imposed.

Organisation of Labour in the Colony.—For twenty years after 1861 the Colony progressed steadily, and as borrowed money came to be expended in public works so labour flourished, and the working man found the Colony a paradise from which he wished to keep all intruders. The organisation of labour began and was developed in the decade that preceded 1881 so completely and fully that organised labour forced recognition on politicians, and succeeded by 45 Vict., No. 12, the Trade Union Act of 1881, in getting legal status for its combinations. This Act was assented to on December 16th, 1881. On December 6th, 1881, the Royal Assent was granted to an Act to restrict the influx of Chinese into New South Wales—45 Vict., No. 11,

the terms of which were more severe than those of the Act of 1861. S. 3 provides:

> If any vessel having on board a greater number of Chinese than in the proportion of one Chinese to every hundred tons of the tonnage of such vessel, shall arrive at any time in any port of this Colony, the owner or master shall be liable on conviction to a penalty of one hundred pounds for such Chinese carried in excess of the foregoing limitation. . . .

S. 4. provides:

> Before any Chinese arriving from parts beyond this Colony shall be permitted to land . . . the master of the vessel . . . shall pay to the said collector of customs or other principal officer the sum of £10 for every such Chinese. . . .

S. 5 provides that Chinese arriving other than by sea shall pay a poll-tax of £10. S. 9 provides:

> It shall be lawful for the Colonial Treasurer . . . upon the application of any Chinese . . . a *bona fide* resident of the Colony, that he desires to be absent therefrom, for a temporary purpose only, to grant to such Chinese a certificate that he is exempt from the provisions of this Act for a time specified in such certificate.

This Act cut down the number of Chinese allowed to land from any vessel to one-tenth of those allowed by the Act of 1861.

A strike is indicative of the power of Trade Unions and of the condition of their organisation. In 1890 the great strike of workers in Sydney caused such a state of civil commotion that large numbers of special constables, foot and mounted, were enrolled. The mention of this strike is but to show that in 1888 the organised power of labour was a factor perceptible in the public life of the Colony more clearly than at any previous period. Politicians had to reckon with that power, and small wonder is it that leading public men were driven to perform acts which were especially directed towards humouring it. Sir Henry Parkes, then Premier of the Colony, influenced by the necessity of humouring the labour factor, in order to maintain his place as a free-trade Minister, in 1888, by an order, unauthorised by Parliament, and merely *ex proprio motu*, caused a number of Chinese who had arrived by a vessel in the harbour of Port Jackson to be prevented from landing. The Chinese community in Sydney, being large and having many comparatively wealthy members, took up the cudgels on behalf of their countrymen, and applications to the Supreme Court were made for writs of *Habeas Corpus* in the case of two of them as tests.

Test Cases in the Law Courts.—In *ex parte Lo Pak* (N.S.W.L.R. ix. 221) the applicant held a certificate of exemption under s. 8 of the Chinese Restriction Act of 1881, and on the strength of it claimed to be entitled to land in New South Wales, although he was not naturalised in that Colony. In *ex parte Leong Kum* (N.S.W.L.R. ix. 250) the applicant had never been in New South Wales before; but £10, the amount of

the poll-tax imposed by s. 4 of the Chinese Restriction Act of 1881, had been tendered on his behalf to the proper officer. After long argument before the full Court sitting *in Banco*, the judges held that though the applicants were aliens, they were entitled to relief under the Habeas Corpus Act (56 Geo. III., c. 100, s. 1), as they were complying with certain terms imposed by Act of Parliament, and consequently they could not be kept in restraint on the mere order of the Premier. This shows that as against the growing power of labour and its endeavours to lessen competition in the labour market in New South Wales, there was a power which watched over that freedom which is the cherished right of all when complying with the law under the British flag. Not that there was any party or class feeling shown by the judges; far from it. The Australian Bench has been and is as pure and upright as the English Bench, as just and as uninfluenced by personal feeling. The Court that decided the two cases above mentioned was called on in the case of *Lau yon Fat* (N.S.W.L.R. ix. 269) to decide on an application made by a Chinese, naturalised in the border Colony of Victoria, to be permitted to come into New South Wales unconditionally under the provisions of s. 10 (*infra*) of the Act of 1881, allowing free entry to British subjects. The Court held that the Certificate of Naturalisation issued in Victoria had no extra-territorial effect, nor was it equivalent to the Certificate of Exemption to be issued under s. 9 of the Act of 1881, as above set out. Consequently the applicant failed, and so was thrown back on s. 5 of the Act of 1881, which enables a Chinese arriving otherwise than by ship to enter New South Wales on the payment of the poll-tax of £10.

The Chinese Restriction Act, 1888.—Defeated in the Law Courts, Sir Henry Parkes introduced, and Parliament passed, the Chinese Restriction and Regulation Act of 1888, 52 Vict., No. 4. The provisions of this Act are more stringent than those of the Act of 1881. S. 3 states:

> After the passing of this Act no certificate of naturalization shall be issued to any Chinese on any ground whatever. . . .

This was not in the Act of 1881. S. 5 and 6 provide that only one Chinese in proportion to every three hundred tons burden of the tonnage of a vessel carrying Chinese shall be allowed to land in New South Wales, and on every such Chinese so landing the poll-tax shall be £100. As compared with the Act of 1881, the Act of 1888 lessened the number of Chinese allowed to land from any vessel to one-third, and the poll-tax was raised tenfold. S. 9 of the Act of 1881, under which a Chinese going abroad might obtain a certificate of exemption (*supra*), does not appear in the Act of 1888; but Chinese naturalised in New South Wales, and Chinese holding certificates of exemption under s. 9 of the Act of 1881, are exempt

from the provisions of the Act of 1888. A new clause in the Act of 1888 provides:

> S. 11.—No Chinese who shall arrive in this Colony after the passing of this Act shall be permitted to engage in the work of any gold, silver or other mine, or in any mining pursuit whatever, without express authority under the hand and seal of the Minister in charge of the Department of Mines.

This, clearly, is a provision passed in the interest of a particular class, and is internal evidence to show the influences that caused it. S. 10 of the Act of 1881 provides:

> Notwithstanding anything in this Act contained, any Chinese . . . who produces evidence . . . that he is a British subject shall be wholly exempt from the operation of this Act. . . .

In the Act of 1888 s. 15 is in almost similar terms, save that in place of "British subject" there appears "by birth a British subject," putting beyond doubt any chance a naturalised subject might have to enter New South Wales.

So far the Chinese had been the banned race, more particularly as they had been found to enter into industrial life in those walks in which the white man wished to go. Meanwhile, from year to year large numbers of Syrians had come to New South Wales, as also had many natives of Hindustan, both of which devoted themselves to store-keeping and petty hawking throughout the country. Their pursuits were not such as the white man desired for himself, which may account for the fact that no restriction had been imposed on their entry into the Colony.

The Parliamentary Labour Party.—During the years that followed 1888 the labour organisations became so strong that they were able to send their representatives into Parliament, and the Labour Parliamentary Party was established, conducted in its action by caucus, each member bound hand and foot by the bond of secret caucus rule. The industrial advance of Japan, a close geographical neighbour, during that decade (1888–1898) came to be looked upon as a menace to Australia, and a possible incursion of Japanese workers was spoken of in the circles of labour. To keep up and to raise wages at all hazards became practically the chief business of the Parliamentary Labour Party, and consequently the restriction of competition in the labour market was an end to be attained. Forming a Third Party in an otherwise fairly divided House, the labour caucus virtually swayed the Ministers of the day, and so, in the matter to which attention is devoted in this paper, in the year 1898 the Statute Book of New South Wales showed on its pages the Immigration Restriction Act, No. III., 1898.

Opportunity may be here taken to give a few figures illustrative of the population and the public debt of New South Wales, at the times when

the second, third, and fourth Acts dealing with immigration restriction in New South Wales were passed. The spending of public borrowed money benefits labour by maintaining wages at a non-natural level, and when long persisted in demoralises the workers. The fewer there are to share the loan the greater is the share of each. It is here boldly stated that the lavish public borrowing by New South Wales in the past caused the birth and growth of the labour power politically—a power excellent when under due restraint, but fatal to all industrial enterprise when allowed to run free so as to degenerate into a tyranny.

Year.	Population.	Public Debt.	Debt per Head.
		£	£ s. d.
1881	782,080	16,924,019	21 12 10
1888	989,340	44,093,049	41 19 0
1898	1,323,130	63,112,720	48 1 0

In the year of present writing (1903) the public debt of New South Wales is, in round figures, £82,000,000, while the population is under 1,500,000!

The Immigration Restriction Act, 1898.—The *Deus ex machina* in relation to the restriction of immigration being revealed, the stringency of the Act of 1898, which was the first Act directed against all outside labour competition, can be understood. The preamble of this Act begins:

> Whereas it is desirable to place certain restrictions on immigration . . .

S. 2 provides that the Act shall not apply to (1) any person holding a local certificate permitting his entry into the Colony; (2) any person for whose immigration provision has already been made; (3) any person specially exempted by the Colonial Secretary; (4) Her Majesty's forces; (5) the crews of British men-of-war; (6) the crew of any ship during her stay in New South Wales; (7) any person accredited by any Government.

S. 3 provides:

> The immigration into New South Wales by land or sea of any person of the class defined in the following subsection, hereinafter called "prohibited immigrant," is prohibited—namely,
>
> Any person who when asked to do so by an officer appointed under this Act, shall fail to write out in his own handwriting, in some European language, and sign an application to the Colonial Secretary in the form set out in Schedule B of this Act or in a form of a similar purport proclaimed from time to time by the Governor in substitution of the form set out in such Schedule.

Penalties are provided in the case of the unlawful entry into the Colony of a prohibited immigrant, or for assisting the same. The Act does not extend to persons who have been formerly domiciled in the Colony, nor

to the wives and children of persons not being prohibited immigrants. S. 6 provides that a person appearing to be a prohibited immigrant shall be allowed to enter the Colony on conditions—viz. (*a*) that he shall deposit £100 with the proper officer; (*b*) the deposit to be returned if, within a week after landing, he shall obtain a certificate as provided that he does not come within the Act; (*c*) on failure to obtain such certificate the deposit may be forfeited, and he may be treated as a prohibited immigrant. S. 8 provides a penalty for the master of a ship landing a prohibited immigrant.

The matter for consideration is s. 3. The framers of the Act, no doubt, had in view the possibility of international complications, if restrictions were placed directly and *eodem nomine* against particular nationalities. Nominally, the Government of the day supported the Act as necessary to secure a "white Australia," and to prevent for ethnological reasons a possible invasion by Asiatic peoples. To shut out Japanese and Indians and Syrians by name, on the score of race, would be to offend friendly peoples, who could not very well complain of an educational test which, on the wording of the section, could be applied to any British subject as well as to an alien. But, at the same time, s. 3 could be used to shut out all persons that any political party in power might wish to exclude. The labour market could be kept bare at the will of the Government. For, on the strict wording of s. 3, no immigrant could claim to be tested in his own language, and an English carpenter might be called upon to satisfy the examining officer in the Russian language, and be prohibited from landing if he could not pass the test. In a word, the examining officer could, at his will, stop the immigration of any person he might desire to stop.

By the Commonwealth of Australia Constitution Act, 63 & 64 Vict., c. 12, s. 51, the Federal Parliament is given exclusive power in the Commonwealth to make laws with respect to (xix) Naturalisation and Aliens, and (xxvii) Immigration and Emigration; and the Federal Act No. 17 of 1901 (1 Edward VII.), the Immigration Restriction Act of 1901, is now substituted for, and abrogates, the local Colonial Immigration Restriction Acts.

Into the Federal Parliament organised labour sent its representatives, and the Federal Labour Parliamentary Caucus directs the social legislation of the Commonwealth.

The "Prohibited Immigrant."—S. 2 defines as a "prohibited immigrant" who may not enter the Commonwealth:

(*a*) Any person who when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer.

(*b*) Any person likely in the opinion of the Minister or of an officer to become a charge on the public, or upon any public or charitable institution.

(*c*) Any idiot or insane person.

(*d*) Any person suffering from an infectious or contagious disease of a loathsome or dangerous character.

(*e*) Any person who has within three years been convicted of an offence, not

being a mere political offence, and has been sentenced to imprisonment for one year or longer therefor, and has not received a pardon.

(*f*) Any prostitute or person living on the prostitution of others.

(*g*) Any person under contract or agreement to perform manual labour within the Commonwealth: Provided that this paragraph shall not apply to workmen exempted by the Minister for special skill required in Australia, or to persons under contract or agreement to serve as part of the crew of a vessel engaged in the coasting trade in Australian waters, if the rates of wages specified therein are not lower than the rates ruling in the Commonwealth.

The exemptions are similar to those as set out above under ss. 2 and 5 of the New South Wales Act of 1898, the other provisions of which are incorporated and developed in the Commonwealth Act.

Criticism of the Act.—For the welfare of Australia the prohibition of the classes (*b*), (*c*), (*d*), (*e*), and (*f*) is proper and statesmanlike, but the clauses (*a*) and (*g*) cannot be justified on the principles of the law that relate to the freedom of the subject. The comments above made on the definition of "prohibited immigrant," in the New South Wales Act, apply equally to clauses (*a*) and (*g*) of the Commonwealth Act. One of the basic constitutional principles of British law is that British soil is free to the foot of every British subject, restraint being lawful only when imposed for the public welfare, and that on British soil freedom of contract, *eo loco*, between parties is to be maintained. Broad constitutional principles override the works of Parliaments, so that Acts passed in opposition to those principles must be *ultra vires* and of no effect. Clause (*a*) above set out is an example of such repugnancy to constitutional principle, that it must, if ever submitted for judicial decision, be declared to be *ultra vires* the power of Parliament in respect of British subjects. Under its conditions the English carpenter, as above pointed out, can, though a free British subject, be prohibited from landing on British soil at the whim or caprice of a Customs House officer. It cannot be maintained that his ignorance of Russian is a menace to the welfare of the community ethnologically, socially, or economically, upon which grounds alone a person may be excluded rightly and justly. In a case lately decided in Sydney, in which the Crown in an Excise case (*P. Healey's Case*) contended that the Federal Excise Act put the onus of proving his innocence on the accused, contrary to the recognised principle of British law, that a man is presumed to be innocent until proved to be guilty, Pring J., of the Supreme Court, dealing with the contention as repugnant to British law, referred to clause (*a*) above set out as being equally repugnant to the same principles. The "Six Hatters Case," in which certain tradesmen, British subjects and members of their Trade Union, were prevented from landing in Sydney under the above clause (*g*), is well known to all. As they were eventually landed under the proviso, the legality of the restriction was not tested.

It is not necessary to discuss the reasons why it is good to declare, by Statute, null and void in one part of the British Empire contracts which are to be performed there, but made in other parts. Suffice it that they are many, and are universally recognised by jurists to be good. S. 11 of the Commonwealth Immigration Restriction Act provides:

> No contract or agreement made with persons without the Commonwealth for such persons to perform manual labour within the Commonwealth, whereby such persons become prohibited immigrants within the meaning of paragraph (*g*) of section three shall be enforceable or have any effect.

The effect of this section must be that as soon as a British prohibited immigrant under clause (*g*) comes within Federal jurisdiction—that is within three miles of Australia—he ceases to be bound, and as far as any action he may wish to take, should he be allowed to land, he is as free as air. The nullifying of his contract destroys the conditions that made him a prohibited immigrant, and, provided that he does not come under the other clauses of s. 3, he can claim his right as a free Briton to tread on free British soil. To interfere with this right on the ground that he had made a contract which cannot be enforced is to penalise him for an act, in itself innocent, that has no consequences, and is *ultra vires* the Parliament of the Commonwealth. The interference with the Six Hatters was a blunder. As far as a British subject is concerned clause (*g*), s. 3, is non-existent in face of s. 11.

By gradual steps, urged, no doubt, by the selfish stimulus of the manual worker, the regulation of undesirable immigration into Australia has been evolved by the statesmen of Australia. A modification of the educational test (*a*), or the substitution for it of a racial test, and the total elimination of clause (*g*) in s. 3, would leave the Commonwealth Immigration Restriction Act a measure of great value in the development of Australia, in so far as it would shut out undesirable immigrants without leaving in the hands of any person the power to harshly exclude desirable settlers in order to please the whim of any party.

Aggrieved Japan.—The severity of the Commonwealth Immigration Restriction Act has drawn forth the declared resentment of the Japanese, and this paper cannot have a more suitable conclusion than the translation of two extracts from Japanese newspapers published in March of this year, relative to the Immigration Restriction Legislation of Australia, Canada, and the United States of America:

> In some cases we must be prepared to offer a determined resistance to external oppression on our emigration, and should such resistance necessitate sacrifices of the first magnitude, the people ought not to shrink from the task. We are already paying a good sum of money for the maintenance of a strong army and a strong fleet, and also of a Foreign Office with a large staff. These institutions are not for ornament. Looking at the tendency of affairs abroad, the coast is not

quite clear for carrying out an emigration policy. We cannot, under these circumstances, help urging upon our Government and people the necessity of a firm determination on their part.—*Toyo Koizai.*

And as comment on above:

We are ourselves strongly inclined to resent the unfair discrimination made against our nationals in the countries named above, and we have never missed an opportunity to condemn such discrimination. We can, therefore, understand the strong feeling exhibited on this subject by our weekly contemporary. Nevertheless, we must remind the latter of the very serious, injurious influences that might follow the use of such intemperate language. A war with either the Americans or the English is out of the question, as nothing would be gained by it, while everything might be lost.—*Japan Times.*

CRIMINAL PROCEDURE IN THE TRANSVAAL.

[*Contributed by* W. F. Craies, Esq.]

General Observations.—In a previous number of this journal[1] the present writer ventured on certain criticisms and suggestions with reference to the law of South Africa, and expressed the hope that during the period of Crown Colony Government in the newly conquered territories steps would be taken for the proper and systematic creation of a series of South African Codes. His views met with considerable criticism from Sir Henry de Villiers,[2] who deprecated any attempt at codification before federation; and by Mr. Berwick,[3] who was chiefly concerned to maintain the vitality of Roman-Dutch law. With respect to one branch of that law there seems, however, to be a fairly general agreement that it possesses no distinctive elements which render it superior to the English law, except, perhaps, the existence of the offence *furtum usus* and a very wide if not vague definition of *stellionatus*, or cheating. The adjective portion of the law, being based on the Roman system, has been found on most points incompatible with the British notions of the administration of criminal justice, and even before the South African war had been to a large extent superseded by local legislation, or by the adoption of principles from the English system where the laws of Holland were silent.

The Transvaal Legislature has now taken a step in the direction suggested by the writer, by passing an Ordinance to establish a Code of Criminal Procedure without waiting for federation. This Code was passed by the Legislative Council on January 2nd, 1903, was assented to on January 7th by Lord Milner, and on April 3rd it was intimated that the King would not exercise his powers of disallowance.

The Materials for the Code.—The Code, which contains 281 sections, has been printed as a Parliamentary Paper (1903, C. 1555) with a short report as to its origin and special characteristics. At the outset of the South African war criminal procedure was regulated in the South African Republic by an Ordinance (No. 5 of 1864—also known as No. 9 of 1866) copied almost verbatim from Ordinances and Acts of the Cape Colony, the earliest of which dates from 1828 (No. 40). A draft Criminal Procedure Law was published in the *Staats Courant* in 1899, but was not proceeded

[1] N.S., vol. ii. p. 233. [2] N.S., vol. iii. p. 9. [3] N.S., vol. iii. p. 98.

with owing to the outbreak of the war. In cases where the Ordinance was silent, the procedure followed seems to have been that in use in the Cape Colony.

In framing the new Code it was deemed expedient to incorporate almost in their entirety the provisions of the Cape law:

(1) because it was practically in force in the Transvaal;

(2) because such adoption would tend to promote an end much to be desired—uniformity in the laws of British South Africa.

But the Cape Colony law only deals with procedure up to committal for trial. An Ordinance of 1828 (No. 40) introduced a system bearing more resemblance to English than to Roman-Dutch procedure, with provisions as to warrants and as to preliminary examination, which was at first permitted to take place before an officer of police, but was later made purely judicial. In other words, the inquisitorial system, or *instruction criminelle*, was superseded by a system on English lines, in which, however, the Public Prosecutor was given a larger part than he as yet occupies in England. But here the Cape legislation ended, and the Transvaal authorities found themselves under a practical necessity for further legislation, because it was proposed to get rid of the special Courts which during and after the war administered the Criminal Law in the Transvaal and to confer general jurisdiction on the Supreme and Circuit Courts, and because there were not any rules of procedure in existence applicable to these Courts. The Government thereupon seems to have made a study of comparative legislation within the Empire; and the procedure on trials for indictable offences has been framed after an examination of the Criminal Codes of Canada (1892), Queensland (1899),[1] and India (1898).[2] No express reference is made in the Code or Report either to the English or to the Roman-Dutch criminal procedure. Here and there a trace of Roman-Dutch influence is found—*e.g.*, in the use of "exception" for "demurrer." But the result is that the procedure is taken *à deuxième reprise* from the Common Law of England, with modifications mainly borrowed from the three Codes already cited—modifications, be it said, calculated to simplify and improve procedure.

Some English Characteristics.—The preparatory examination or preliminary enquiry is on the same lines as that of Jervis's Act (11 & 12 Vict., c. 42), itself to a large extent a re-enactment of earlier legislation beginning with Philip and Mary, and differs from that of the Cape by adopting the alternatives of summons or warrant, the latter only being used in the Cape, except in the case of offences, for which arrest may be made without warrant. Special provision is also made for recording evidence against a person who has absconded without any immediate prospect of his arrest (s. 95). This differs somewhat from the Star Chamber clauses in the Irish Crimes Act[3] and Sir

[1] 63 Vict. No. 9. See this Journal N.S. 1900, p. 555.

[2] Act v. of 1898. Journal 1899, p. 467.

[3] 50 and 51 Vict., c. 20.

W. Harcourt's Explosives Act,[1] but is a useful provision for the perpetuation of testimony, as the depositions taken can be subsequently used as evidence, if the witness dies or is incapable of attending Court, or is kept away by the accused.

Pleading Guilty.—Another very special provision is that which permits the accused to plead guilty at the preparatory examination, in which case he is committed, not for trial, but for sentence only, and if he consents the recalling of the witnesses at the trial may be dispensed with (s. 76). This provision, adopted from the Queensland law (the Justices Act of 1866, 50 Vict., No. 17, ss. 113, 138), is calculated to save largely the expenses of prosecution and the time of witnesses. A similar regulation exists in Scotland in the provision as to a pleading diet and the remittal for sentence only to the Court of Justiciary of persons pleading guilty to offences as to which the sheriff has no jurisdiction. If the Prisoners' Defence Bill is passed in the present session of the Imperial Parliament, the consequent increase in the duration of the sessions of criminal Courts might to some extent be counterbalanced by the introduction of a similar provision into the English law, and the taxpayer's pocket would profit largely thereby.

Commissions to take Evidence.—From the India Procedure Code of 1898 have been adopted provisions (ss. 208–211) enabling the Supreme Court to issue commissions for the examination of necessary witnesses where their attendance cannot be obtained without unreasonable delay, expense, or inconvenience. The commission may issue either as to witnesses within the Colony or to witnesses resident outside the Colony. The commission may not go except on a specific statement of the facts as to which the witness's evidence is required; and when the application is made for the Crown, the Court may impose as a condition of its order payment for the legal representation of the prisoner on the commission.

The depositions returned by the commissioner are to be filed on record, and may be read as part of the evidence of the case. Due regard is had to the protection of the interests of the accused, and very great expense may be saved. The acting Attorney-General of the Colony, in speaking of the former law, says: "At present it is not uncommon for the Crown to have to bring out witnesses from England to prove purely formal facts, such as that the accused does not keep an account at a particular bank. In a recent case in the Cape Colony it would have been necessary, if the prosecution had been proceeded with, to have subpœnaed Lord Salisbury to deny a statement that nobody believed. Besides, in a great many cases witnesses cannot be compelled to attend."

In this connection it may also be said that s. 228 adopts, also from the Queensland Code (Art 644), the rule that the accused may admit *on the trial* any fact alleged against him, and such admission is sufficient proof of the

[1] 46 and 47 Vict., c. 3.

fact without other evidence. No provision is made for any notice to admit facts; nor is any change made in the rules as to putting in evidence admissions or confessions made *before* the trial; but the section quoted rejects the English rule that a prisoner can admit nothing—except his guilt.

Bail and Indictments.—The law as to bail is simplified by making it compulsory on committal, except in cases of treason and murder, subject to the discretion of the magistrate as to the amount of bail, which must not be excessive (s. 103). The Supreme Court has power to admit to bail at any stage of the proceedings in every criminal case, and to review any refusal by a magistrate to grant bail (ss. 101, 104); and the Code deals, apparently with sufficient detail and completeness, with the duties of sureties, instead of leaving the practitioner to hunt about for them in the obscurity of ancient text-books.

Chapter IX, which deals with indictments, is what may be called an improved edition of the English law. There being no grand jury, the indictment, as in Scotland and the Australian Colonies, is in the name of the Attorney-General. But the rules as to joinder and variances and the description of persons and things closely resemble the law as stated in detail in Archbold, with modifications derived from Canada and Queensland; and with the addition of a clause (121) empowering the Courts to order particulars in all cases where they seem necessary; and before deciding as to the propriety of making such an order, the Court is to have regard to the depositions taken at the preliminary examination.

Trial.—Chapter X. deals with the trial of indictable offices before a judge and jury. The rules as to arraignment and pleading are as in England, except (1) that the accused may demur and plead together, (2) that he may plead two or more pleas together, unless one is a plea of guilty.

S. 167 empowers the Court to order the separate trial of persons jointly indicted. S. 168 empowers the Court to order the removal of a prisoner who, during his trial, so conducts himself as to render the continuance of the proceedings in his presence impracticable, and to go on with the trial in his absence. And the same section empowers the judge to clear the Court, or that any persons or classes of person may leave the Court, thus getting rid of a doubt often expressed as to the powers of English judges. Counsel for the Crown is not given the last word (s. 171).

Perhaps because jury trial has not lately been in use in the Colony, sections are included which detail the functions of judge and jury in the following sections:—

172. After the evidence is concluded and the counsel or the accused person or persons, as the case may be, have addressed the jury or stated that they do not wish to do so, it is the duty of the judge to instruct the jury as to the law applicable to the case, with such observations on the evidence as the judge thinks fit to make.

173. It is the duty of the judge—

(*a*) to decide all questions of law arising in the course of the trial, and

especially as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties: and in his discretion to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;

(*b*) to decide upon the meaning and construction of all documents given in evidence at the trial;

(*c*) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;

(*d*) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

The judge may, if he thinks proper, in the course of his summing up express to the jury his opinion upon any question of fact or upon any question of mixed law and fact relevant to the proceedings.

175. It is the duty of the jury—

(*a*) to decide which view of the facts is true, and then to return the verdict which under such view ought according to the direction of the judge to be returned;

(*b*) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not;

(*c*) to decide all questions which according to law are to be deemed questions of fact;

(*d*) to decide whether general or definite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure, or unless their meaning is ascertained by law, in either of which cases it is the duty of the judge to decide their meaning.

Ss. 176 and 177[1] deny to the jury the absolute right to return a general verdict except in cases of libel, and empower the Court to make them answer specific questions; and s. 185 provides that if during a trial a juror dies or becomes incapable to act or is absent, the Court may direct the trial to proceed before the remaining jurors, provided that the number of the jury is not reduced below six. This gets rid of the difficulty occasioned in England when a juror falls ill half-way through the trial, for under the Common Law it is necessary to discharge the eleven and retry before a fresh jury and recall the witnesses.[2]

Appeals.—Chapter XX. (ss. 267–274), which deals with appeals, departs somewhat from the English system.

The Court of trial is empowered to reserve for the consideration of the Supreme Court any question of law arising on the trial, and if judgment is asserted, must, on the application of the prosecution, reserve such a case.[3] The accused is also entitled to apply to have an entry made on the record stating the nature of any proceedings at the trial which he alleges to be irregular or not according to law, and on filing a copy of the entry may by leave of the Supreme Court appeal against the conviction (s. 268).

[1] Adopted from the Queensland Code (Arts. 624, 625).

[2] *R.* v. *Bertrand*, L.R. 1 P.C. 520.

[3] Taken from the Queensland Code.

The powers of the Supreme Court in dealing with appeals or cases reserved are the same as those of the Court for Crown Cases Reserved, but they are not obliged to set aside a conviction for irregularity or illegality, or improper admission or reception of evidence, unless they think that the defence was prejudiced by the irregularity or illegality, or some substantial wrong was done by the rejection or reception of the evidence.

Punishments.—One or two chapters of the Code deal with matters which are not strictly matters of procedure. Chapter X. includes a number of rules of evidence which were probably overlooked in framing the Evidence Proclamation of 1902, or were too special to be included therein; and Chapter XVIII. deals with the punishments which may be inflicted by a superior Court—viz.:

(1) Death.
(2) Imprisonment with or without hard labour and with or without solitary confinement.
(3) Detention in a reformatory.
(4) Fine, which may be substituted for or added to any other punishment except in capital cases, and may not exceed £1,000 or the special statutory limit for the offence.
(5) Whipping.
(6) Forfeiture of property.
(7) Putting under recognisance to keep the peace and be of good behaviour.

S. 90 prescribes a maximum of twenty-five lashes in cases remitted for summary trial; s. 256 allows a maximum of fifty in cases of conviction or indictment. But the Colonial Secretary has intimated that the maximum should in no case exceed twenty-four lashes, and has requested that an amending Ordinance be introduced at an early date.

The preceding pages by no means exhaust the points of interest and novelty in the new Code, and it is humiliating to have to say in conclusion that the fact of its existence is a reproach to English legislators. It seems astounding that while Colony after Colony, whether autonomous or Crown-governed, is consolidating or codifying its laws into statutes not of inordinate length or complexity, and is in the process introducing obvious reforms for the simplification of procedure, the criminal law of England is left in a complex chaos of Common Law and Statute without any effort to utilise the labours of commissioners and individuals who have already prepared draft codes which, without undue labour and revision, might be made law. The drafts lie idle in Government offices here, though in the Colonies they have formed a valuable basis for codification; and the legal practitioner is left to find out his criminal law on short notice from text-books encumbered by a mass of cases, many of them on repealed statutes and hidden away in reports not easily accessible, the whole of which could be cleared away by a well-drawn code.

Codification has usually been more easily accomplished in States under autocratic government and in Colonies under the direct control of the Crown, but the example of the autonomous Colonies indicates that progress towards a well-ordered simplification of law is not incompatible with the most democratic constitution. The Mother of Parliaments alone seems unwilling itself to undertake or to trust others to complete the task of codifying a branch of the law which, above all others, ought to be included in a single well-penned and well-considered statute, a task which other legislators within and without the Empire have found not only possible, but beneficial.

TRADE UNIONISM AND LEGISLATIVE REFORM.[1]

[*Contributed by* D. R. CHALMERS-HUNT, ESQ.]

Aggressive Competition and its Limits.—There are, as is well known, certain kinds of conduct which for various reasons of policy are all in a sense prohibited by law. One may not, for instance, with impunity assault another; one may not traduce another man's character, or prosecute him without reasonable and probable cause; one may not break the contract which he has made with another, or convert another's property to his own use; or trespass on another's land, or use his own land or otherwise so conduct himself towards his neighbour as to constitute a private nuisance towards him in the enjoyment of his property. Nor is a man safe from civil proceedings if he conducts himself towards the public in an illegal and criminal manner under circumstances which prejudice an individual in a special way over and above that in which the rest of the public are affected. I do not, of course, mean that under any conceivable circumstances any or every one of these acts is never deemed legally justifiable; for that is far from being the case; indeed, it is not invariably criminal or illegal even to destroy a man's life. And in many of these cases it is essential, to give rise to civil liability, that a person alleging himself to have been the victim of a prohibited act show a specific and appreciable damage to himself. But for the most part all these things are prohibited by law on various grounds of policy. I will therefore ask the reader to detach from his mind these instances of wrong-doing and the like, which the law characterises as wrongful on more or less well-established grounds, and to which various special considerations of policy apply; and I shall ask him to suppose, for the sake of argument, that we live in a Utopian state of society where no one ever indulges in prohibited acts of this character, and where the only way in which a man ever does harm to his neighbour is by refusing to deal with him in business, or by getting other people or

[1] Since the type of this article was set up, the Court of Appeal have delivered judgments in the cases of the Glamorgan Federation and *Giblan* v. *National Amalgamated Labourers' Union*, overruling the decisions of Bigham J. and Walton J. respectively; and the House of Lords has affirmed the decision of the Court of Appeal in the *Glamorgan* case. The salient points of the judgments are inserted as footnotes hereto, and render no other alteration necessary.

by threatening to get other people not to so deal with him. In short, I will ask him to treat the law of tort, for the moment, as if it were no more than a law of compensation for the infliction of a money loss—a law of compensation for acts of any kind whereby a man's financial position is rendered relatively inferior to what it was before. And I will then venture to propound this question for his consideration: At what point ought the opportunity in a well-ordered community to cause annoyance and financial loss, with the object of diverting money from the pockets of other people into one's own, to be arrested by the State?

Here, it will be seen, we have a conflict of two great principles or matters of policy. On the one hand, one has it that it is the business of the State to preserve individual interests as far as possible. A man, one can surely say, has an abstract right to the security of his pocket—a claim to be recompensed for a loss which is unjustifiably inflicted upon him, provided there be no paramount policy of a contrary nature to step in and prevent the adjustment being made. That is part, I think, of the broad foundation of law and order. On the other hand, it is equally certain that the State must tolerate or encourage, and does tolerate or encourage, competition. But what is meant by "competition"? If one looks up the word in an approved dictionary, one finds that it expresses "a seeking by two or more for the same thing," a definition which is accurate enough if the word be used in its widest and most literal sense. But for the lawyer, the judge, and the statesman, this word "competition" has, I think, a far narrower signification. In connection with the subject of trade interference it may mean, may it not, "an ostensible, and not merely an actual, seeking by one person or set of persons as against another person or set of persons, to divert money or its equivalent, by way of business enterprise in a given market," whether that market be one for the disposal of valuable commodities, or for the disposal of personal services, which is the market of Labour. With regard to this definition nothing more need be said at present, except to point out that the word "competition" literally implies the opposed efforts of two or more persons, and to that extent imports, hypothetically at least, a psychological fact or phenomenon. And also, it may be observed, every great shipping federation, as also every great railway company, in that it carries for hire cargoes living or inanimate, persons or property, in competition with all comers, and with all would-be appropriators of custom in the trade, plies its calling in the market of service equally with the humblest labourer who breaks stones in the street. Now, the State encourages or tolerates, and must encourage or tolerate, competition. But upon what ground? The answer is that competition, in the limited sense in which I have used the term, is not only a necessary and inevitable feature of social and commercial life, but is, when restricted within proper limits, an incident of national existence and prosperity. But it is impossible to compete, whether in the field or market of trade or of labour, without hurting

other people, and not only that, but it is idle to say that it is possible thus to compete without intending in some sense to hurt the people competed against. The well-regulated State, therefore, adverting to its general duty to safeguard the interests of the individual, is forced to strike a balance somewhere. At what point, then, does sound judgment, sound statesmanship, and sound legislative policy demand that the line should be drawn?

"**The Nearer the Gain, the Better the Right.**"—Long meditating on the *Mogul* case, *Temperton* v. *Russell*, and *Leathem* v. *Craig*, it occurred to me that since the desirable end was to find a principle which should accurately differentiate competition which could be considered as a good, or at least as an inevitable necessity within the community, from that which could not, it was possible to determine the legality of aggressive conduct by estimating its relation to an expected gain, not in the ratio of their commensuration or respective quantities or amounts, but in the ratio of cause to effect. The policy of the State, I began to suspect, and later to clearly see, must depend, *ceteris paribus*, on a principle which I formulated in the following terms: "The nearer the gain, the better the right." The truth of the proposition may be demonstrated as follows: We may start with the premises that competition in a market of exchange is in some sense a necessary evil and perhaps a national good. One cannot compete without hurting others, and without in a sense intending to hurt them. Neither of these facts admit, I think, of doubt. Then take two extremes of competitive aggression: first, aggression by a prudent man of business, whereby he intends to divert, and does in the result divert, another's trade to himself; then compare the case of an aggression by a fanatic or a lunatic which is in no way related to competition in a market, but who nevertheless thinks that he is thereby competing in a market. That clearly must be an unnecessary evil. For in such a case injury is inflicted without any corresponding benefit either to an individual or the community. We will call the first instance a case of gainful damage and express it in terms of x. The second case we will term a case of gainless damage and express it in terms of y. It follows that the exact point where competition ceases to be beneficial to, or a necessary evil within, the State lies somewhere between the extreme types of conduct represented by x and y. And that exact point must be in truth the point where a damage ceases to be gainful, according to the judgment of an exactly accurate, infallible, and prescient opinion, in its nature or calculated effect and as inflicted in a market of exchange. But inasmuch as absolute prescience is unattainable in this world, and no one can be expected to have a greater share thereof than is possessed by ordinarily reasonable and well-educated men, it is necessary to substitute for the arbitrament of a prescient infallibility that of the opinion of all reasonable and well-instructed minds.

Now this principle of policy is equally applicable whether we suppose what was denied in *Allen* v. *Flood* to be true, namely—that it is *prima facie*

wrongful to procure a man not to deal in business with a third, or to interfere with him in his trade—or whether we admit the correctness of that denial, and suppose (as I understand Lords Macnaghten and Brampton to imply by their judgment in *Quinn* v. *Leathem*) a simultaneous and preconcerted attack by two or more to be itself wrongful in character and to need justification. It does not, however, affect in the least those cases of wrong-doing referred to at the commencement hereof, which present various considerations of policy, and any one of which is incapable of being overridden by any element of competition in a market.

Competition and Public Necessity.—Assuming, then, the authoritative faculty of differentiation to lie, failing the Legislature, with the judiciary, as representing the Crown and as being both the repository and the mouthpiece of high legal policy, the next question arises, Upon what principle or principles is it to be determined when competition ceases to be a public necessity or a public good? The answer is, that aggression ceases to bear this character when its objectively calculated effect is not to adjust market values or otherwise is not to further a commercial struggle or opposition of interest in a market. By "objectively calculated effect" I mean that the question for determination is not what was the nature of the actual intention, object, or motive underlying the effort, but whether the relative position of the parties and the circumstances generally under which the act of aggression took place are such as will lead a reasonable and well-informed person, say the judges or the Legislature, to say, "This act of aggression is presumably referable or proximate to the furtherance of a commercial struggle or opposition of interest in a market. This effort is legally competitive in character, and is therefore unobjectionable."

The reason for all this is surely obvious. Experience teaches us that human nature is prone to act on assumptions which are false and beliefs which are erroneous—a tendency which is as apparent in commercial as it is in social matters—and thus it becomes imperative, since we are dealing with a question affecting the public good, to superimpose an artificial signification of the term "competition"—namely, by assigning to it this objective sense as opposed to the subjective use in which the term has hitherto, to the best of my belief, always been employed and understood. The reason for the insertion of the words "in a market" will be equally plain. *Ex hypothesi*, competition is and always will be a necessary incident of civilisation, to be tolerated as such by the State only so far as it tends to further the successful overthrow of an opposed interest or claim in a market. And in a case where it is not suggested, nor could be suggested by anybody in his right mind, that the aggression complained of can effect any such result, the duty of the State to protect the individual remains paramount upon a judge declaring that there are no facts at all from which such an effort can be presumed; just as it remains paramount, as will be shown, where a judge should declare that whether or no there might be such an effort

in fact, there are no circumstances from which it can be fairly and properly presumed—or there are other circumstances rebutting such presumption—that the aggression is referable to such proposed or actual effort. It is thus for the judge to determine the objective character of the effort. In illustration of the former of these classes of case, I would refer to the facts in *Gregory* v. *Brunswick* (6 Scott N.R. 809) and in *Giblan's* case (18 T.L.R. 500), where in neither case was there an actual or possibly presumable intention to further interests in a market, but, in the one case, a mere intention to further the cause of morality and propriety, and in the other to make a man pay his debts. Instances of the latter class of case would be the facts in *Temperton* v. *Russell* and *Quinn* v. *Leathem*, and the conduct of the iron-workers in *Allen* v. *Flood*. In the former class of cases, there is no question of competition at all. In the latter, the limited circumstances and conditions under which competition is to be supported by the State may be conveniently expressed and included in the term "effective competition." And it is conceived that these conclusions must form or be deemed to form part of the Common Law, as having laid dormant for centuries in the mind of the judiciary, and consequently *in nubibus vel in gremio legis*, owing to the operation of a particular doctrine—the doctrine of restraint of trade. But upon the final abrogation of that doctrine in 1871 by the Trade Union Act, these principles, which had hitherto been withheld—as a spring is held back—were suddenly released—as a spring is released—were thus instantly brought into play and became enforceable as part of the Common law. There is clear evidence that competition was known to the old Common Law as a matter of some materiality in considering what is legal and what is not.

Some Conclusions from the Formula.—A practical application of the maxim, "the nearer the gain, the better the right," leads to various conclusions of importance.

(1) **Time Limit.**—Since it is neither a necessary feature of commercial life nor an incident of national prosperity that acts of aggression shall be permitted in respect of a market which is no longer open, of a specific opposition of interest which has definitely ceased to exist, it follows that the motive for toleration of such aggression ceases together with the cessation of the specific opposition of interest in a market.

Similarly again, since the disposition of human affairs is ever unstable and uncertain, the motive for State toleration does not arise unless and until an actual opposition of interests shall have arisen. Hence the right of competition is limitable by the State in point of time—limitable to attacks in respect of present, and not of past or future antinomies or oppositions of interest in a market—antinomies merely held in contemplation, merely contingent, and having no actual visible existence. That principle, as will appear, may properly affect the legality of strikes against non-union men under certain circumstances.

(2) **Space Limit.**—Since the opportunity of obtaining an advantage in a given market arises within the local limits of the market, the right of the aggression in respect thereof must be similarly restricted to the local limits of the market; for the duty of protection becomes paramount when the aggression is pursued without the visible limits of such market. I give the following illustration. What would be said or thought of such conduct as the following? X. and Y. are rival bakers in Ilfracombe. Y. has another business in Edinburgh of the same kind as the Ilfracombe business, but unconnected with it except for the identity of its owner. X., who possesses but his one shop in Ilfracombe, goes to Y.'s Edinburgh customers and persuades them no longer to deal with Y. in his Edinburgh business as theretofore.

I do not mean to imply that it is or that it is not wise policy to give Y. a cause of action under these circumstances—X. being a single individual—but I put this case merely to show that a competitive antinomy or opposition of interest is, and ought to be, conceived by the law as limited in point of space; and consequently that the corresponding right to attack in respect of such antinomy is similarly to be restricted. This principle also may affect strikes against non-union men under certain circumstances.

(3) **Vicarious Attacks.**—Since it is not a necessary feature of commercial life, still less an incident of national prosperity, that officious and unauthorised persons should commit acts of aggression on behalf of other people, there is no reason demanding the toleration of *vicarious* competition, unless expressly authorised by the principal or person directly interested. And since any subsequent ratification of the attack is a matter of pure uncertainty, and more particularly because, until such ratification, the aggression is non-tolerable by the State, considerations of reason and prudence dictate that subsequent ratification shall not be permitted to defeat the policy of protection which would otherwise be paramount. On the other hand, *authorised* vicarious competition is to be defended on the ground that inasmuch as an effort to obtain an advantage in a market is *ex hypothesi* conducive within limits to commercial and national prosperity, or at least is and always has been a necessary feature of civilisation, then an attack based in a manner on mutuality of interest and pre-conceived design, being but the visible and vicarious, the substitutive and representative, expression of such effort, cannot be objectionable.

(4) **Indirect Attacks.**—On the other hand, if it be *necessary* to strike at third persons in order to effectuate a competitive effort, such effort being a necessary incident of commercial life, and the course of commerce being furthered by the prosecution of such effort (more especially when it tends to the determination of a market value), then such an act of aggression being *ex hypothesi* but one of the visible and necessary incidents expressive of such effort, should, as I think, be tolerated by the State. For this reason, it is conceived that the case of *Lyons* v. *Wilkins* (1896 and, per Lord Lindley,

1899), on the question of the boycotting of the out-worker (and not that of the picketing), was wrongly decided. I may add that so far as I can see, this is the only decided case which does not lend itself to the above principles. Substantial justice, therefore, on this view has hitherto been meted out to the workman, with this one exception; and this notwithstanding all that has been recently said to the contrary, and nothwithstanding the recent eagerness in the House of Commons to insist, on inadequate grounds, or no grounds at all, that the *Mogul* case and that of *Temperton* v. *Russell* are contradictory and inharmonious in their import.

The Mogul Case and Temperton *v.* Russell.—The decisions in both these cases are supportable, in my judgment, on sure principle, though the actual *ratio decidendi* in either case may be otherwise. It is certainly to be inferred from the language of some of the judgments in the *Mogul* case that "to ruin a man for the purpose of ruining him alone is illegal, but to ruin him because one wants his trade is legal." But this principle is not irrational if reasonableness of conduct in relation to a lawful purpose be imported as an assumed condition thereof. In the latter case the trade unionists acted as fanatics, whereas in the former the members of the Shipping Federation acted as sensible and prudent men of business. For a number of men to strike against an employer or molest anybody whatever for the sake of the time-work system—*i.e.*, in order to secure an opportunity for the worst men among their number to have an equal chance with the better, but at the latter's expense; or, again, to secure an opportunity for the faster workers amongst them to increase their earnings at the expense of the more easy-going, which is the piece-work system—seems very much like cutting off, in order to spite one's face, not only one's own nose—or at least to risk that calamity—but somebody else's as well. In my little book on trade unions I spoke of this conduct as being arbitrary. In an article in the *Law Quarterly Review* for the present year I have endeavoured to show why I thought so. And the law certainly does not tolerate molestation by simultaneous attacks, in support of these internecine schemes, amounting to neither more nor less than a sweepstake on the rapidity or duration of the work of the various servants of an employer. Even if, for the sake of argument, one assumes a uniform rate of speed and duration, the collective benefit under either scheme would be *nil*, unless indeed the rates of time-work and piece-work be relatively unequal; which, as I pointed out (*ibid.*, p. 187), would be a different case entirely.

Types of Oppression.—(5) Looking at the liability of ill-regulated minds to vindictiveness or tyranny, the duty of the State to protect even where an antinomy or opposition of interests in a market is shown to exist becomes once again paramount when the act of aggression is absolutely, in fact and by reason of the facts, fatal to the furtherance of the alleged design, and not only fatal, but fatal *to the knowledge of the aggressor*. This state of facts, one observes, can very rarely arise in practice, for it presupposes

two conditions as fulfilled: (1) a destructive and not merely ineffectual aggression *quâ* gain; and (2) a knowledge of its vain effect *quâ* gain—a very rare combination of circumstances indeed.

For the same reason, again, even where an antinomy exists, conduct generally may be so far removed from that antinomy as to be non-tolerable on any ground of competition. What would be said or thought supposing A., to whom B, has given a trivial cause of offence, were subsequently, upon an ordinary request being made to him by B., to answer, "I will do what you want, but first you must go without food for so many days, in order that in future you or anybody else who may hear about the matter may be taught an object-lesson, and may know that I am not the sort of person whom one will do well to offend"? Could such conduct be said to serve any reasonable object whatever? This analogy does not sufficiently put the whole matter, for in order to represent the duty of protection, it would be necessary to suppose A. in the case put, to lie under a general duty to comply with B.'s request. Yet to all intents and purposes this was the attitude adopted by the Belfast Union which led to the litigation in *Quinn* v. *Leathem*. It is also conceived that such conduct is otherwise to be condemned as contrary to the principles discussed under heading 1.

Ratio of Cause and Effect.—(6) It is important to appreciate the distinction between injury and gain as related in ratio of their commensuration—that is, their respective quantities or amounts, from injury and gain related in the ratio of cause to effect. One is inclined to think that some of the judges in the *Mogul* case rejected the test of quantitative proportion or relative *adequacy* of result, and, in rejecting it, overlooked or perhaps confused with it the test of proximity of cause to effect; with the unfortunate result that it came to be thought that the law knew no limits to the right of traders to combine if they employed intrinsically lawful means and were not wholly actuated by private animosity. Thus when *Temperton* v. *Russell* came up for decision, the case was thought to present grave and apparently insurmountable difficulties in the way of its having been accurately decided—consistently at least with the *Mogul* case. The distinction between commensuration of injury with gain and proximity of injury to gain is, however, clearly marked, notwithstanding Sir Edward Fry's dictum that "to draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the powers of the Courts." It is apprehended that to gain a profit of sixpence in the course of business in a market a man may bring about, *if necessary to gain it*, damage to another amounting in value to a million pounds, provided none of the illegal acts referred to at the commencement hereof be resorted to. Such a circumstance is but the universal process or phenomenon of the survival of the fittest and the weeding out of the weak, applied or become manifest in commercial life. But it is an entirely different matter when an appreciable amount of damage is inflicted without the person inflicting it being, on any proper and reasonable

hypothesis, a penny the better for the loss which he inflicts. It might happen, perhaps, that where reasonable men, say the judiciary or a House of National Representatives, would be divided or uncertain as to whether a gain was too hypothetical to be sufficiently nearly related to the damage to justify it, the consideration of proportion of damage to a maximum gain, imaginary or real, might be a convenient method of cutting the knot and settling the question. That might be a convenient course to adopt, but it would not, in my judgment, be an accurate or exactly just application of the theory. Relative proximity, and not relative adequacy, of result is therefore the test except so far as that the result—*i.e.*, the gain to be reasonably expected—must be of an appreciable amount, however small.

(7) No instance is known to the writer where necessary and effective competition as above defined has been used as an "engine of malice." People ordinarily have neither the time nor, let us hope, the inclination to thus abuse for ulterior purposes their opportunities of self-advancement. The hypothetical benefit to the State remains intact, despite the motive. The tendency to infer, rightly or wrongly, spite from circumstances of irritation would be very great; and on the whole it seems expedient and politic to subscribe to the principle laid down in *Allen* v. *Flood* in its present application—namely, that ill motive ought not to operate to negative just cause and excuse as a matter of law except in certain special cases, of which this ought not to be considered one.

(8) No reason can be discovered why strikes against a master limiting the number of his servants should be prohibited by the State. It is impossible to go behind the scenes and inquire (subject to 5 *supra*) whether a master would be in the result incapacitated from trading. It is a question of a fair fight and of the survival of the fittest. Similarly a strike against the improper dismissal of a servant, though with lawful notice, seems also vicariously competitive. It is suggested that the Courts for this purpose could with propriety enquire into the merits of the dismissal.

(9) *Strikes against non-union men.*—These would seem to be tolerable by the State only if the following conditions be satisfied :—

(1) There be an actually existing opposition of interest (*e.g.*, the men struck against are workers in the same class of labour), including the fact that an actual movement is on foot in support of such opposition.

(2) The opposition of interest being confined to a given locality or district, the aggressive acts are confined to such locality or district.

(3) The movement is of a nature demanding attraction to a union, or subtraction from the forces of a rival union, in order that work or higher wages may result to the better manned force, by reason of the latter being able to dictate to the employers of union men with greater chance of success, and of thus obtaining wages or the remainder of the employer's work for union men.

A strike, however, resulting in mere swelling of the numbers of a union as against a rival union, or otherwise, and merely with a view to and in respect of possible future and contingent disputes with an employer, are opposed to principle 1 above. A strike against the sub-worker for an employer, the latter of whom employs no men at all belonging to the union responsible for the strike, would appear to be justifiable, not where the strikers presumably want to increase their numbers, but where they presumably want their work. The right to molest ceases with the cessation of the resistance to or opposition of interest. The right to molest in *Quinn* v. *Leathem* ceased upon the intimation conveyed through Mr. Leathem that his men were prepared to join the union. The right to molest in combination the shippers, agents, and plaintiff shipowners in the *Mogul* case would not have subsisted and did not subsist after the struggle or any particular subsidiary and incidental conflict of interest had determined. It seems politic to leave these questions to the judge to be decided according to the circumstances of each case. These considerations are equally applicable, as already observed, whether it be true that interference in trade is *prima facie* wrongful or, as is submitted to be the correct view, only interference by wrongful means, including the instrument of preconcerted attacks by two or more, a feature itself constituting, as it is submitted, a suggestion of *injuria*. These considerations indicate a rational policy, and furnish, it is submitted, the only answer possible to the question of how to govern a country on rational lines with reference to the rights of its trading and labouring associations.

Analysis of some Leading Cases: The "Mogul" Case.—It will be convenient to set out here the net result of four cases of leading importance.

The *Mogul* case (1892) decides that a concerted attack by a shipping combine against shipowners not within the ring (both parties concerned plying for hire on a certain line or route for a certain class of business) by such means as reducing the rates of freight, compelling or inducing shippers to deal only with them, and agents to act only for them, is not an illegal or oppressive combination. Not a single act throughout the whole proceedings was resorted to which was not in any way pre-eminently calculated to effect the desired object; there was a direct and actually existing opposition of interest, and nothing was done which was not purely incidental to the successful appropriation of other persons' chances. The loss sustained by the plaintiffs all meant an enrichment of the defendants. Fry L.J. (and his reasoning was followed by Holmes L.J. in *Leathem* v. *Craig*) expressly adverted to the relative and respective *limits* of the damage and the gain, apparently considered as a clue to motive. Nothing satisfactory, however, can be evolved from any considerations of actual motive. But Lord Field may be deemed to have actually struck the doctrine of "proximity of result," if at p. 57 (A.C. 1892) by "presumption of malice" he means presumption of *law*.

—— **Temperton** *v.* **Russell.**—*Temperton* v. *Russell* (1893) decides that a concerted attack in support of the time-work system of labour is oppressive and illegal. As already explained, the loss was inflicted to enable an unknown unit or proportion of the persons combining to obtain a purely uncertain advantage as against the rest of the persons combining.

—— **Allen** *v.* **Flood**—*Allen* v. *Flood* (1898) specifically decides that for a person to report that an aggressive operation of two or more acting in combination will take place on a given contingency, he not having identified himself in fact by his previous conduct or otherwise with the aggressive intention of the combiners, is not illegal. The judges in that case, however, used expressions some of which were doubtless unguarded, being due probably in a great measure to an unfortunate concession or admission of the complainants' (respondents') counsel. (See *L.Q.R.* 1903, p. 197; at p. 198 the sentence "literal importance ought not to be attached to the language of Lord Watson which, etc.," is a quaint result of the printer's insertion of the word "the" before "language"—an error which I failed to notice in correcting the proofs.) But on the other hand, some important principles of a general character are nevertheless deducible as well from the case, as will hereafter appear.

—— **Quinn** *v.* **Leathem.**—*Quinn* v. *Leathem* (1901) decided that a concerted intimidation of a trader with a view to injuring another trader under circumstances from which it cannot be inferred that the aggression would achieve any present advantage, or at any rate any tangible advantage at all, for the combination, is oppressive, illegal, and actionable.

Legal Propositions in Allen *v.* **Flood.**—I will now return to *Allen* v. *Flood* and the propositions of law which are deducible therefrom. The actual effect of the decision has already been given. Besides that, three other general propositions of vital importance emerge, upon a careful examination of the language used.

(1) The first proposition which, as I should say, is established law beyond question, does no more than impose upon judges and lawyers the acceptation of an elementary legal theory concerning the nature of tort. No action can lie in tort, says *Allen* v. *Flood*, in respect of conduct which does not present in some way external characteristics of some kind (independent of motive in the sense of that which incites to action) which the law designates wrongful, no matter how damaging to an individual it be, or however wicked the motive, in the sense aforesaid, which inspired it.

Simple as it may seem, this elementary principle seems to demand the revision of at least one students' text-book on the law of torts; for although in the long process of time the law may come to be that every action which works the hurt of another is tortious in character and needs legal justification to render it innocent, that is certainly not the law of England to-day. It was really little more than the corollary of this principle which was expressly insisted upon by the majority in *Allen* v. *Flood*.

(2) **Materiality of Motive and Intention.**—The maxim that "an act otherwise lawful does not become unlawful by reason of its being done with a bad intent," further implies that inasmuch as one can never be absolutely certain what it is that induces people to act as they do—whether, that is to say, a man is inspired by anger or by spite or by any other feeling whatever—and more especially because it would be a dangerous thing to allow a man's claim to recover or resist compensation to depend upon a jury's opinion of what one man felt towards another—a man's motive, *i.e.*, that which has incited him to act as he has—his private reason—must in the general case never be enquired into by a tribunal of *law* and as a matter of law (with a few exceptions), except for the purpose of furnishing a clue to a tribunal of *fact* as to a concrete and specific intention. In other words, in determining whether an action will lie, the question of intention or purpose may be material, but the issue of private hostility is not, except in certain cases. A jury may find that a man knew or had notice of a fact, and a judge may draw an inference of law from such finding. But inasmuch as the tendency to infer spite from circumstances of irritation is very great, and might therefore in many cases work injustice if allowed free play as a legal consideration, the question of whether a predominating feeling or reason for conduct underlay a specific action is eliminated from the question which a tribunal of law—*i.e.*, the judge, sitting as such—has to decide, except, as already mentioned, in a limited number of cases of a unique and anomalous character. This principle does not, therefore, preclude enquiry by a jury into facts of or presumptions concerning the existence of such states of mind or psychological facts as the following: Specific purpose taking shape towards a concrete result—*e.g.*, to do a man a harm, or that which will violate his right. A jury may be asked whether a man intended to hurt or injure another where the law admits the materiality of such intention, and evidence of circumstances of spite and irritation may be laid before them. But the issue is one of purpose and not of motive. The law there looks to the direction of intention, not to the propriety of inward feelings.

The cases where predominating motive is permitted to play a direct part in a *judge's* decision seem to be limited to cases of defamation and malicious prosecution. They probably do not include oppressive combination except so far as there may be an issue of knowledge that the injury is ineffective or fatal to competitive gain. At any rate, the circumstances attending the aggression must very clearly evidence a movement undertaken with an evil intent such as happily of so very rare occurrence as to render the question one of little practical importance. Motive may be material in cases of procurement of a wrongful act, but only as associating the procurer with the wrong.

Nuisance.—Then we come to the question of nuisance. To the best of my belief there are two forms of nuisance, and only two, known to the law: (1) private nuisance which means the use of one's land or the use of

a common right in such a way as to materially interfere with another in the comfort and enjoyment of his land or house, not amounting to a direct injury, which is called a trespass ; (2) public or common nuisance, signifying an interference with a right enjoyed by or open to the public. This is a criminal offence, and may also give rise to an action if an individual can show special damage beyond that suffered by the public. The case of *Barber* v. *Penley* (L.R., 1893, 2 Ch. 447), where the proprietor of a theatre was proceeded against for producing an enormous crowd necessitating the interference of the police, and obstructing the adit to and exit from the premises next door, illustrates both classes of nuisance. So far as the production of the play caused an obstruction of the highway, it resulted in a common nuisance ; so far as it affected the owner of the adjoining premises, it constituted a private nuisance. The Latin equivalent of nuisance, *nocumentum*, which, as Blackstone states, means a hurt or injury of any kind, has obviously a signification which is unlimited. But the word "nuisance" had, long before Blackstone's time, come to have a well-defined meaning ; the employment of a technical word in a popular signification is to be deprecated.

The necessity for a strict adherence to the technical import of words sufficiently appears from the analogy which Mr. Haldane seeks to draw between the facts in *Barber* v. *Penley* and the conduct of the trade union in *Quinn* v. *Leathem*. Having stated the facts in *Barber* v. *Penley*, Mr. Haldane goes on to say : "The law refuses to define a nuisance, and treats what amounts to one as a question of fact, and it is plain that whether you collect a crowd by putting attractive pictures in your window, or performing a popular play, or going to remonstrate with an employer at his works, you may cause what the law regards, and properly regards, as a nuisance. It is also plain that if a number of persons combine to boycott a man in his business, and do it in such numbers and in such a fashion as to be a terror to him, this will be a nuisance. What sort of action would amount to a nuisance, is, as I have said, a question of fact which the common sense of the jury has to determine. Now I have pointed out that *Quinn* v. *Leathem* was a very bad case, and I think it might have been determined, and really was determined, on the ground that what happened amounted to a nuisance, quite apart from any question of conspiracy" (*Contemporary Review*, March, p. 366).

Judge or Jury to be Arbiter?—My comment on this is that the issue in *Quinn* v. *Leathem* was not, so it appears to me, an issue for the jury alone to determine. A combination such as that in the *Mogul* case or the Glasgow *Flecher* case may well have caused an equal amount of terror in the minds of the plaintiffs and those who worked for them, as for any caused by the conduct of the Belfast Union. The question whether the threats to Munce and the boycotting of Leathem in order to secure the dismissal of the non-union men was, I submit, a question of law for the judge, depending

upon whether the dismissal of the other non-union men served in any reasonable manner to further the interests of the union. And, as I have pointed out, the opposition of interests ceased immediately the union became aware that the men were willing to join; and, further, it may well be, I think, that the case decides that the mere giving of an object-lesson to others, not coupled with the advancement of any material interest, is not an act of effective competition. In other words, an attempt to injure others by concerted attack against one or more, not being incidental to a definite movement, is not allowable. Given that conduct is lawful in its external character and appearance, can it become unlawful merely on the ground that it is in point of fact ever so distressing to a person prejudiced thereby?

The serious consequences of what may be a misconception, but of what rather appears to indicate the advent of a revolutionary crisis in our law, becomes manifest when one reflects that competition is not an excuse for a public or a private nuisance but for concerted injury or intimidation offered to a man in his trade; and to leave it to the jury to say when competition should or should not be an excuse for the use of numbers would be to leave questions of national policy to twelve jurymen.

No doubt in the case of public nuisance it is the province of the jury to say whether there was or was not a nuisance in fact—*e.g.*, an obstruction of the highway; and possibly too, it is the jury's duty, or as one judge has remarked, it is *said* to be the jury's duty in the case of private nuisance, to answer the question of nuisance or no nuisance, in the limited sense that they have to determine whether the user of land or other conduct materially prejudiced the plaintiff in the comfort or enjoyment of his land. The application of the rule in *Allen* v. *Flood* to the law of private nuisance would seem to be not altogether free from doubt. But it is conceived that in cases where the reasonable user of land is in question, the judge will decide the matter by considering the apparent purpose to which the land has been put, without enquiring as to the motive which induced the occupier to apply it to such purpose.

(3) **Refusal to Deal with Another.**—The third proposition which the judges laid down in *Allen* v. *Flood* was one of a narrower character, amounting to a decision as to whether unlawful characteristics were or were not presented by a particular class of conduct.

First, it was asked, is there anything suggestive of wrong in merely refusing or omitting to have dealings with another in trade, or to enter into relationships of any kind with another? To this the majority of the noble and learned judges, as was to be expected, gave an unqualified answer in the negative. Next, is there anything suggestive of wrong-doing in merely dissuading, under circumstances entirely free from aggression or combination, a man from dealing with a third person in his trade, or from entering into relationships of any kind with him. A baker, Brown, sets up a shop in the same town or street as another baker, Jones, with the express and

sole purpose of injuring Jones, because he has a grudge against him, and in the result he ruins Jones's trade in the town or street. This is an extreme case, and one scarcely likely to arise in practice, but I give it because it was put by a learned judge in the course of the argument during the hearing of a recent case in the King's Bench Division. According to the doctrine of *Allen* v. *Flood*, the answer in this case must also be in the negative,[1] and for the following reasons. It must happen every week, and probably every day, said the Lords in effect, that a man persuades or induces another by intrinsically lawful means not to enter into contracts or deal in business with a third. Yet during all these centuries, in none of the books can one single case be found where such conduct has been held actionable. People have dispensed all these years with the luxury of a remedy at law on this ground, and considerations of public policy, not to mention the instinct of legal conservatism, demand that we should not make a beginning at this late period of our national history. This silence is significant, said the majority of the Lords, and speaks to the existence of a negative or exclusive policy. The business of the Courts is already sufficiently congested without further opening the door to multiplicity of actions, vexatious and otherwise. Here we have, they said, not only the evidence of a past judicial policy, but the very ground as well of its existence. "The truth is," said Lord Macnaghten, "that questions of this sort belong to the province of morals rather than to the province of law" (L.R., 1898, A.C. p. 152). In the supposed case, then, Brown's act not being unlawful in its character, the motive, however unworthy, can make no difference. We may say, therefore, that this particular proposition deducible from *Allen* v. *Flood* is based like other propositions of law, upon considerations of public utility and expedience.

The actual decision in *Allen* v. *Flood* is in like manner a rule based on reason and expedience. A. tells B. that C. means to murder him (B.) if he does not do or cease to do something—*e.g.*, employ a particular servant. Here it is obviously to B.'s interest that he should know of C.'s design, and it would be utterly inexpedient to hold A. liable to him or the servant for an unlawful threat, for he had, if C. meant what he said, probably averted the commission of a crime. Accordingly C. alone is the person liable in law to B. or the servant for any damage arising out of the incident.

Procurement of Others not to Deal.—To return to the question of procurement of others not to deal with a third person, attention may be drawn to one piece of evidence upon the point as to whether a contrary rule has ever been recognised. Mr. Justice Wright, whose judgment appears to have played an important part in assisting the majority of the noble and learned judges at arriving at their decision on the present question, says that in

[1] The Court of Appeal (in *Giblan's* case) restated, if not restored, the doctrine that for one man to stop another earning his livelihood is a legal wrong needing justification. The case suggested has never yet arisen.

Lumley v. *Gye* "none of the very eminent judges or counsel in the case seem to have been aware of the doctrine now suggested. If it had been known to them, some mention of it must have been made, and it would have rendered unnecessary most of the arguments and elaborate reasoning on other points" (L.R. 1898, A.C. p. 67).

This statement seems to need a certain qualification. Crompton J. does say this (2 E. & B. at p. 230): "Suppose a trader, with a malicious intent to ruin a rival trader, goes to a banker or another party who owes money to his rival and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party, I am by no means prepared to say that an action could not be maintained." This language is followed by certain remarks concerning conspiracy of which the accuracy is at least open to question, and it does not in the least affect the force of Mr. Justice Wright's concluding observation. *Rogers* v. *Rajendro Dutt* (13 Moo. P.C. 209) is also an important case in this connection.

Is a Strike Illegal "per se"?—It has already been observed that the rule in *Allen* v. *Flood* does not preclude judges in every case from enquiring into the motives underlying an act or course of conduct, when once characteristics suggestive of wrong-doing have been shown to attach to such act or conduct. In connection with this it is important to notice a divergence of judicial view upon a purely academical question, since such divergence has led, I think, and is apt to lead in future, to a certain confusion of thought and language. It has sometimes been stated by the judges in the past, and Mr. Justice Wills appears to have delivered himself to that effect in giving judgment in a case arising out of the well-known Taff Vale dispute, that there is nothing *per se* illegal in a strike. "A strike," he is reported to have said, "is not in itself illegal" (*Times*, December 20th, 1902, p. 7). This statement, accurate enough in a sense, is not incompatible with the view that every strike is *primâ facie* unlawful unless justified by the law on grounds of policy or otherwise. A strike is not *per se* unlawful, but none the less it invariably presents circumstances suggestive of illegality, as will be shown hereafter, and is therefore wrongful in character; and all that Mr. Justice Wills can be taken to imply is that a strike is not absolutely and universally illegal. It does not seem accurate to say that a strike is lawful, any more than it is true to say that it is lawful for a man to traduce another man's character. Turning to *Allen* v. *Flood*, we find the point of judicial divergence on a purely technical matter connected with the law of defamation—a divergence of view which probably would be similarly illustrated with reference to the law of strikes, and in a similar manner tends to obscure the real matters at issue. At p. 50 of *Allen* v. *Flood* we find that Mr. Justice Wills denies that a defamatory (*i.e.*, a false) statement is to be treated as academically wrongful when uttered or written on a privileged occasion. Turning to p. 93 of the same case, we find that Lord Watson, as also Lord Herschell at p. 125 and Lord Davey at p. 172, lay down exactly the contrary.

All that is here canvassed—and it is a matter of no real importance, except so far as it tends to obscurity and confusion—is therefore whether an act can be said to retain its illegal or wrongful character when it is excused by the law and consequently is not actionable. Mr. Justice Wills says defamation on a privileged occasion is neither wrongful nor actionable. Lords Watson, Herschell, and Davey say that it is wrongful in character but not actionable. In the same way Mr. Justice Wills denies that a malicious prosecution set on foot with an entirely honest motive is wrongful. Lords Watson, Herschell, and Davey say that it is wrongful in character but not actionable. So too, I think, with reference to strikes, the same learned judge appears to lay down that they do not present wrongful characteristics, while Lord Macnaghten may be taken to say, I think, that a strike does present wrongful characteristics invariably by reason of the relative disadvantage under which one man suffers, when attacked by two or more linked together by a common purpose of aggression, but that it is actionable only when it is oppressive. And to ascertain this oppressiveness or otherwise, one must be guided by considerations of reason and policy. With reference to the case of *Stevenson* v. *Newnham* (13 C.B. 285), the true inference seems to be that it decides that neither purpose nor motive can convert an act when lawful in the sense in which the conduct in that case was lawful, can render that class of conduct unlawful. It was also undoubtedly treated as an authority for the general proposition that the issue of private motive as distinguished from purpose is not in the general case an issue capable alone of determining questions of right.

Oppressive Combination.—The law on this matter is principally to be found in *Gregory* v. *Brunswick*, the *Mogul* case, *Temperton* v. *Russell*, and *Quinn* v. *Leathem*.

It will only be necessary here for me to treat of a single aspect of this particular topic, which, however, is one of the gravest importance. It often is and has been insisted, and insisted by men of ability and distinction, that conspiracy cannot be a cause of action. That which is lawful, it is urged, if done by one, cannot become unlawful if done by several. Probably no more specious shibboleth has ever been advanced. It may be refuted in a sentence. That which is lawful, intrinsically and apart from any element of combination, remains, intrinsically and apart from combination, lawful, whether it be done by one or a million, so long as that million do such intrinsically lawful acts separately. But when such intrinsically lawful acts are done by several acting together and are aggressive, or at least intimidatory in their character, then the fact that such attacks are made in pursuance of a preconcerted arrangement introduces a new element—namely, the delivery of two or more separate attacks not necessarily made in the strictest sense of the term simultaneously, but made in accordance with a previous agreement to make them, and in such a way as to cause discomfort or alarm. Nor does the conception of conspiracy to injure turn on any question of whether

two or more or how many are necessary to produce a result, as may arise in certain cases of nuisance or other sources of illegality depending on numbers—*e.g.*, riot, unlawful assembly. That question, the question of perpetration, is only material as to whether a civil action will lie in the particular circumstances of a given case, and not as to whether the combination be illegal or not.

The earliest instances where the first of these extremely fallacious notions and its condemnation are to be found are the cases of the journeymen tailors of Cambridge, *R.* v. *Eccles* and *R.* v. *Mawbey*, cited by Lord Brampton in *Quinn* v. *Leathem* (1901, A.C. 530). We next find it in a passage of Dickinson's *Quarter Sessions* (Serjeant Talfourd's edition at p. 335): "Mere concert," says Serjeant Talfourd there, "is not in itself a crime, for associations to prosecute felons have been holden legal." The context of this passage, which is cited by Mr. Justice Wright in his book on Conspiracies without comment amongst other authorities collected in support of either view, puts the question in the strongest fashion; but I think the argument contained therein may in a similar fashion be refuted at a single stroke. For Serjeant Talfourd omits to notice that it is a matter of indifference to the felon how many they be who prosecute him, if for one and the same offence. It is the relative disadvantage which constitutes the criminality and the illegality of oppressive combination, coupled possibly with the feature of intimidation and possibly with some consideration of the right of an individual to preservation of his financial interests. The latter, however, does not seem a very material consideration, except for the purpose of estimating the damages, if any, in an action on the case for conspiracy. Conspiracy to injure is somewhat as if a traveller should be attacked from two points at once by persons whose attacks he could sufficiently withstand if made separately. One expects a nation's laws to express a national sentiment; and it would have been strange indeed if such a doctrine should have been found to be non-existent in the laws of a nation renowned for its love of fair play. There are several authorities for the proposition that the simultaneous action of two or more persons linked together by the common purpose of aggression may be illegal and even criminal. The two against one policy, the ordinary feature of trade union methods, is to be condemned in any well-ordered State as a matter of national policy, especially or at any rate when a man's trade or calling is affected, except where on general or paramount grounds of public policy the security of the individual must be so far sacrificed to the more pressing needs of the community. That is, I fancy, broadly speaking, the position which Lord Macnaghten has taken up in recent cases (see his judgment in *Quinn* v. *Leathem*, and a very significant passage of his judgment in *Allen* v. *Flood* at p. 147, the latter clearly showing that in stating that the strike of the ironworkers in that case was lawful, his lordship had laid out of consideration the question of conspiracy). It may be added that Sir William Erle in his book on Trade

Unions recognises (pp. 33, 40) that conspiracies under the legislation obtaining at the date he wrote were indictable on the ground of restraint of trade with or without the feature of "simultaneity." The legislation of 1871 destroyed the doctrine of restraint of trade, but left untouched the liability for "simultaneity"; an expression which, although a convenient one, scarcely perhaps accurately expresses the true nature of conspiracy to injure. For the latter appears to depend upon the making of separate but preconcerted attacks of a harmful nature by reason of a certain simultaneity or appearance of simultaneity, used in a general and not absolutely literal sense. To threaten to procure such preconcerted attacks by others is in the same case as joining in such an attack itself—*i.e.*, as threatening what would be an unlawful act. Lastly s. 3 of the Act of 1875 clearly assumes that a combination may be criminal though, apart from such combination, the conduct agreed upon would not be criminal. And the Law Officers of the Crown have recently advised the Government that a similar proposition is applicable, substituting the phrase "civilly wrongful" or "actionable" for "criminal."

The Law of Picketing.—This seems clear and simple.

(1) Picketing may be actionable if in the opinion of a judge or possibly a jury it amounts to a private nuisance to the owner or occupier of premises—*i.e.*, materially affects the enjoyment and comfort of such owner or occupier. Motive here seems entirely immaterial.

(2) Picketing may be indictable if it amounts to a public nuisance—*e.g.*, obstruction of the highway.

(3) It is indictable and restrainable by injunction if it comes within s. 7 of the Conspiracy and Protection of Property Act, 1875. Labour representatives are, however, justified in claiming that Parliament never enacted or intended to enact, by that section, that watching and besetting as a stepping-stone to persuasion should be a criminal offence. The Court of Appeal in *Lyons* v. *Wilkins* appear to have been betrayed into the notion that it is impossible to watch and beset a man's premises for the purpose of persuasion without intending to coerce him as well. Coercion is, it is true, a form of persuasion, but the plain fact remains that the Statute declares in effect that the watching and besetting and other matters specified in the section shall be *used as an instrument* of persuasion to render it indictable, which is a very different thing from declaring that attending in force at or near a man's premises in order to peaceably persuade him or others to do something or other is indictable. Assuming for the sake of argument that every attendance at or near another's premises is a watching and besetting within the meaning and for the purposes of the section, the view of the Court of Appeal goes the length of assuming that the expression "watches or besets" implies, by the aid of some sort of conclusive legal presumption, an aggressive "view" or "object," which is certainly not the necessary implication in fact of those words. The Statute nowhere says that an attending at or near premises or a watching and besetting thereof shall be deemed

conclusively and invariably to be that which it may be, but which invariably it is not—namely, an act done with the purpose of aggression. But on the other hand, if "watching and besetting" is not to be thus taken to import aggression, nothing short of an aggressive object will suffice to render the "watching and besetting" aggressive in character. Hence it follows that an attendance merely in order to seize an opportunity of persuading, as distinguished from an attendance resorted to as a means itself of persuasion, negatives the notion of the existence of any such "view to coerce" as that specified by the section. Moreover, the rule of construction that a criminal statute enactment shall be interpreted in favour of and not against a defendant is certainly well known to our law. This is the only point which seems to call for the necessary or proper interference of the legislature on this branch of strike law.

Procurement of a Breach of Contract or other Wrongful Act.—The law on this matter is conceived to be as follows: Wherever a man

(*a*) by coercion or personal inducement, direction, or persuasion; or

(*b*) by any act of material assistance

leads or procures another to violate a third person's right, well knowing of the outstanding right in such third person, he commits a wrong to such third person, the main question being whether the wrongful act can be said to be constructively the act of the alleged procurer.

The following points call for observation:—

(1) The question of whether a person in procuring a breach of contract or other wrong acts with (*a*) improper or (*b*) interested motive do not directly affect the question of liability. Lord Watson, it is true, says "he (the procurer) will incur liability if he knowingly *and for his own ends* induces that other person to commit an actionable wrong" (1898, A.C. 96); but the whole gist of Lord Watson's argument in *Allen* v. *Flood* upon the present source of liability is directed to showing that that liability is, in any direct sense, entirely free from question of internal feeling or motive. Is it conceivable that a man may knowingly procure a wrong, and then turn round and say, "I acted for the best," without showing other grounds of justification? It may be further noted that where the representation is that of a mutual promise of support, we get agreement to do a wrongful act, which is a hybrid form of the action on the case for conspiracy. The cases of inducement by personal direction are alone, strictly speaking, referable to the maxim, "*Qui facit per alium facit per se.*" For these reasons, therefore, I prefer to consider that disinterested advice honestly given to do wrong does not usually serve to identify the adviser with the wrong, rather than to consider that such advice is "privileged"; although I understand Sir F. Pollock to take this view (*L.Q.R.*, April 1903).

(2) The term "malicious" applied to procurement of a breach of contract signifies merely that the violation of the right was procured in the full knowledge that the right subsisted, and that the wrongful act is otherwise

constructively the act of the alleged procurer. The leading case on the former of these points is *Blake* v. *Lanyon* (6 T.R. 221), where it was held for a man to harbour a servant—*i.e.*, employ him knowing of the existence of a subsisting contract of service—was, under the circumstances, conclusive evidence of malice, in that he could not give the assistance in question without "intending" to violate the contractor's right, since he had notice of it; and the fact that he had originally employed the servant without such notice made no difference. To "harbour" a servant signifies to employ or continue to employ him with notice of a subsisting contract of service. That case, as was pointed out in *Lumley* v. *Gye*, has been often followed. Many cases can, however, be imagined when such employment with notice would not be an act of "material assistance," and would therefore not be wrongful.

Just Cause or Excuse.—(3) Lord Macnaghten lays down (1901, A.C. 510) that "it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference." The phrase "sufficient justification" would doubtless include the feature of a superior right to specific performance of a prior inconsistent contract, or otherwise a right to the nonperformance in specie of the contract in question (Cf. *Read's* case; 1902, 2 K. B. 732).

Fiduciary Relationship.—It has recently been attempted to draw an analogy between cases where the individual personally and wilfully originating the commission of a wrong occupies a fiduciary position towards the actual wrongdoer, and defamatory statements made or written on a privileged occasion—*e.g.*, when a common interest exists. The suggested analogy, however, is not a true one, and for the following reason. It is of the essence of the liability for procurement of a wrong that the procurer knows or must be taken to know of the existence of an outstanding right, and that what he wilfully procures is a legal wrong. The wrongdoing by someone is admitted. The question is whether another is implicated in the wrongdoing in such a way as to render him constructively liable with the ostensible wrongdoer. On the other hand, to constitute a defamatory statement privileged, it is necessary that the person setting up privilege shall not know that the statements made are otherwise than true. No statement of fact known to be untrue is ever privileged, and such statement if defamatory in character is absolutely wrongful. The question there is not "Who did the wrong?" but, "Was there wrongdoing at all?" This consideration seems to lead to the conclusion that where a violation of legal right has occurred and those responsible for the violation consist of two persons, namely, the direct or actual wrongdoer and a person in the background who pulls the strings, and is the actor, authoriser or personal causer of the wrongful act—*is qui facit per alium*—no ground of justification is open to the wirepuller which would not be open to the actual wrongdoer. In other words, privilege cannot arise out of any relationship between wirepuller

and wrongdoer. Take the strongest case imaginable. A lady of full age and in full possession of her faculties and of the facts, engages herself to marry a man who is an undesirable *parti* in every way. Her father, by the constant use of argument and persuasion, induces her at length, and not without great difficulty, to break off her engagement. If the law admits a right of action in the disappointed suitor at all under the circumstances, why not against the parent who is the prime cause of the violation of right? True, a knowledge of a possible action for damages might deter parents from acting under these circumstances with the same freedom as that with which they would act if such a liability did not exist. But is not the answer this? Suppose the father's moral duty be to act in this way, is it also his *legal* duty? The courts have to administer rules of law, and not of morality. If the law *acknowledges a right to compensation* in such a case, would it not be exercisable especially against the *fons et origo injuriae*? It is conceived that it can never be a man's legal duty to direct and originate a violation of legal right, and that the question is rather one of damages and costs.[1]

Private interest.—I venture to doubt whether the liability for personal direction of wrongdoing turns wholly on the question whether the author of the wrong has a private interest in the commission thereof. The introduction of this consideration as a sole test is, I think, likely to prove misleading. Suppose A and B (who is weakminded or ignorant) agree that A shall regulate and direct every action of B, and in pursuance of such arrangement and solely on B's behalf, A instigates and directs B to commit a wrong, it is difficult to see why a judge should not decide the matter by directing the jury that the wrong was constructively the act of A, being solely due to the activity of his mind or will. The difficulties suggested by the case of the Glamorgan Federation (Cf. 1903, 1 K. B. 110) now before the Court of Appeal seem capable of solution upon an application of the following considerations of fact. (1) Did the Federation possess exclusive powers of controlling and regulating the actions of the men within the radius of their employment? Was the Federation formed on the understanding that whatever the Federation advised or ordered the men would obey to the letter? (2) If so, did the Federation, acting in pursuance of the power thus vested in them, order the men to break their contracts? It has been said that if the Federation were to be held liable, solicitors, doctors, and other persons in the position of confidential advisers would be precluded from giving the best advice that the occasion demanded. The province, however, of a confidential adviser is to suggest a course of action as being

[1] According, however, to Stirling L.J. (cf. his judgment in the *Glamorgan* case), the unique position of a parent makes a difference. The special nature of the contract and the vital consequences of its performance may also render the supposed case an anomalous one. The decision of Bigham J. that the Federation was not liable in that case has been overruled by the Court of Appeal (Romer and Stirling L.L.J.J.; Vaughan Williams L.J. diss.); and the judgment of the Court of Appeal has been affirmed by the House of Lords.

advisable, but not to regulate and control a man's actions. Independent suggestion is one thing; personal regulation, rendered possible by a *de facto* control, is another. I venture to suggest the law to be that where a man undertakes the exclusive control or regulation, not only of another man's affairs but of his actions, he will be personally liable for any wrongful act he induces by reason of, and in exercise of the regulative power possessed by him; and this quite independently of any private motives that may influence him. Whether the person charged has *actively* participated in the wrongdoing is a question of fact for the jury. Slightly different considerations apply, but with equal force, to the legal or medical advisers, or confidential friend, who should leave his rôle of confidential adviser and, not contenting himself with furnishing mere advice, should for some reason or other make the matter one personal to himself, so as to constitute a *faciendum per alium*. Here there is no complete surrender of personal discretion by the wrongdoer; but the inducer is none the less liable. The closer the relationship of confidence the better the opportunity in fact for the wilfully and personally procuring that for which the law confers a remedy. When, however, a man has already made up his mind to commit a legal wrong, and seeks assent or approbation, or being uncertain as to the proper course to pursue requests advice as to whether he shall commit the wrong or no, and subsequently or consequently the act is done, such act could hardly be said to be the act of the person giving the advice; for such an inference is negatived by the circumstances. The questions "quis fecit?" "uter fecit?" or "qui fecerunt?" thus furnish the main test or tests in cases of alleged personal inducement of wrongdoing, and are inferences partly of fact, partly of law, deducible from all the circumstances of the case. Cases of the knowingly giving of that which is in fact of material assistance in the commission of the wrong, as *e.g.* in *Blake* v. *Lanyon*, seem really referable to the same root principle.

It follows from the foregoing that (1) Mere advice to commit a wrong is never actionable except (*a*) on some independent ground of deceit or defamation; or (*b*) the advice be given for private ulterior reasons; or (*c*) it amounts, in fact and by reason of the facts, to persuasion or else to personal direction or request, coupled with the feature of a *de facto* control. Considerations of motive or interest may be a guide to the determination of the question of "quis fecit?"—but no more.

(2) If *Blake* v. *Lanyon* and the cases following it are right, the conscious giving of material assistance is in the same case with personal direction, persuasion, or request. The only objection to their accuracy lies in the fact that they go somewhat beyond the strict application of the maxim "*qui facit per alium facit per se*." They have never been overruled; and it is submitted that they were rightly decided, inasmuch as they display the phenomenon of a *faciendum* with the knowledge of an outstanding right, although the "*faciendum*" is "*cum alio*" rather than "*per alium*."

Liability of Unions for Acts of Servants.—It is conceived that the liability of Unions for the acts of their servants and officials must be identical with that of masters for the acts of their servants done "in the course of their employment." If the cases be closely examined (see especially *Bayley* v. *Manchester Railway Co.*, L.R. 7 C.P. 415; *Limpus* v. *London General Omnibus Company*, 1 H. & C., 526; 32 L.J. Ex. 34; and *Dyer* v. *Munday*, 1895, 1 Q.B., 742), that liability would appear to turn on two general principles,[1] one of law, and the other of fact. (1) Was the act complained of sufficiently closely related in kind not only to the express authority given to the servant, but to the powers and opportunities possessed by him in fact, as that a reasonable man could suppose that under the circumstances the servant might be fairly expected to commit the wrongful acts in question? If that be the true view, then the terms of an express authority or of the rules of a union are not entirely conclusive; and with reason, for otherwise a master would only be liable for the wrongful acts of his servants which he had expressly authorised, and would on that account be scarcely ever liable at all. This question is therefore one of general or implied, and not express, authority or power; and the rule is easily comprehensible if the principle of policy underlying it be held in mind. (2) Was the act done on behalf of the master and in furtherance of his interests? Did the servant act with his master's interests at heart? This second condition appears to impose a check on the operation of the first.

S. 3 of the Conspiracy and Protection of Property Act, 1875.—This enactment has no application in a case where the question for decision is one of civil liability. It clearly applies to employed and employers alike in their capacity as such, but not to the latter in their capacity as mere traders. I inadvertently stated to the contrary in my article on "Labour Competition and the Law" (*L.Q.R.*, 1903, at p. 185).

[1] The above view is taken by the Court of Appeal in *Giblan's* case, relying on the dictum of Willes J. in *Barwick* v. *English Joint Stock Bank* (Ex. Ch. L.R. 2 Ex. 259), and overruling the decision of Walton J. Stirling L. J. distinguishes the case before him from that of *Poulton* v. *L. & S.W. Ry. Co.* (L.R. 2 Q.B. 534) on the ground that a corporation and a trade union are on a different footing. It is questionable, however, whether the whole applicability of the doctrine of *ultra vires* in this connection, together with the reasoning and decision in *Poulton's* case, do not rest on a profound fallacy. Every wrongful act of the servants of a corporation is *ultra vires* as regards the corporation. The real suggestion in these cases is not that the act complained of is the act of the corporation, but the act of its servant or servants, and that it is so nearly related to the duties imposed upon him or them in fact as to render it an act in the course of their employment. In the case of *Limpus* the defendant company was a corporation.

REMUNERATION OF TRUSTEES AND EXECUTORS.

[*Contributed by* Edward Manson, Esq.]

Anomaly of the Existing Practice.—For centuries trustees and executors have gone on discharging the onerous duties incident to their respective offices, administering property, which is not their own, for the benefit of others, exposed to temptation from within, to risks from the fraud or negligence of trustees, to the solicitation of beneficiaries to breaches of trust, called strictly to account as often as they have yielded to such solicitation or deviated a hair's-breadth from the letter of their trust, and all this unrecompensed, unthanked—a striking example of altruistic virtue and disinterested devotion to duty. All other persons engaged in the management and administration of property not their own are paid for their time and trouble—solicitors, receivers, liquidators, trustees for debenture holders, judicial factors, judicial trustees, committees, trustees in bankruptcy. Trustees and executors alone are not, and so familiar has custom made the anomaly that people hardly ever ask the question why it is that trustees and executors are thus left unremunerated.

Its Cause.—But if the question is asked, the reason commonly assigned is the technical maxim of equity that a trustee is not permitted to make a profit out of his trust. He is not permitted to charge for his time and trouble, nor even for his professional services, unless specially authorised so to do by the terms of the trust instrument, or will. Now for this rule, like most well-established rules of equity, there is a very good reason to be shown, and the reason is this, that the first business of trustees—as of executors—is to protect the estate, and if they were allowed to charge it in their own favour with remuneration for their time, trouble, and services, there could be no one in a position to check such charges, and the estate might thus be eaten up by exorbitant claims.

The Rule of "No Profit."—Lord Lyndhurst in *New* v. *Jones* (1833) (1 Hall & Twells 632) states the principle very lucidly, speaking with special reference to a solicitor-trustee. "There is no point," he says, "more clearly established as a general rule by the case of *Robinson* v. *Pett* (1734) (3 P. Wms.) and other decisions than that an executor or trustee is not entitled

to be paid for his trouble. If the accounts of the deceased are complicated and the executor takes upon himself to settle and arrange those accounts, although it may take up much of his time and attention, the principle of equity is that he is not entitled to compensation for his time and trouble. . . . The principle is this : it is the duty of an executor and trustee to be the guardian of an estate, and to watch over the interests of the estate committed to his charge. If he be allowed to perform the duties connected with the estate and to claim compensation for his services, his interest would then be opposed to his duty, and as a matter of prudence the Court does not allow the executor or trustee to place himself in that situation. If he chooses to perform those duties or services on that estate, he is not entitled to receive compensation. The rule applies as strongly to an attorney as to any other person : for if an attorney who is an executor performs business that was necessary to be transacted—if this attorney, being executor, performs those duties himself, he, in my opinion, is not entitled to be paid for the performance of those duties : it would be placing his interests at variance with the duties he has to discharge. It was said that the bill might be taxed, and that this would be a sufficient check. I am of opinion that it would not. The estate has a right not only to the protection of the taxing officer, but also to the vigilance and guardianship of the executor in addition to the check of the taxing officer. There might be cases where a trustee placed in the situation of a solicitor might, if he were allowed to perform the duties of a solicitor and to be paid for them, be so placed that he might find it very often proper to institute and carry on legal proceedings which he would not do were he to derive no emolument from them, and were to employ another person. In point of prudence and propriety, and as a guard over the estate, I am of opinion that it would not be proper that a solicitor who is a trustee should be distinguished from an ordinary trustee. If a trustee who is a solicitor acts as a solicitor, he is not entitled to charge for his labour; he is entitled to be paid only his costs out of pocket." And this is the law of England to-day. Solicitor-mortgagees have been allowed by the Mortgagee Legal Costs Act, 1895, to charge profit costs, but solicitor-trustees, in the absence of a special clause, are still restricted to out-of-pocket costs.

The Reason of the Rule.—Conceding the above rule to embody a sound principle, still the measure of its applicability is the reason of the thing, and the reason is the necessity of protecting the trust property against charges of *indefinite* amount. There is no policy of the law that trustees are not to be remunerated at all; in fact, we know the solicitor-trustee is constantly allowed to charge for his professional services, that legacies are being daily given to acting executors, and that trustee and executor companies administering estates or trust property are invariably paid. The question is as to the mode of remuneration, and with regard to this all that the law says is that trustees must not be placed in such a position as may tempt them to

betray their trust and help themselves out of the estate at any rate they may choose to put upon the value of their services. Eliminate this danger: make it certain that the estate will not be unduly charged, and the objection to trustees or executors being paid vanishes; and if the question is asked how this can be done, the answer is by paying trustees or executors just as receivers and liquidators and judicial factors or trustees are paid—by a fixed salary, representing in the case of executors a percentage on the capital value of the estate, and in the case of trustees a percentage on the income passing through the trustee's hands, in both cases according to a graduated scale. Thus an income from trust funds under £500 might pay 3 per cent. = £15; an income over £500 and under £1000 2½ per cent. = £25. The *cestuisque* trust or beneficiaries would know exactly how much the trustees or executors were enabled to claim, and there would be no risk of overcharge. Such statutory right of remuneration would, of course, be subject to any special agreement between the *cestuisque* trust and the trustee, fixing a higher or lower rate of remuneration or dispensing with any.

Impolicy of Unpaid Labour.—With this safeguard against abuse, is there any valid reason, on general principles, why a trustee or executor should not be paid for his work? Trust work and executorship work are in the strictest sense business, often of a very harassing kind, and it is not—to say the least—businesslike that it should go unremunerated. Unpaid work can rarely be satisfactory. It is not in human nature to give the same attention to, or bestow the same pains on, work done gratuitously as on work done for reward. Our law recognises the fact in the lesser degree of diligence required of a gratuitous as compared with a paid bailee: and this is not mere mercenariness; it is—in a way—conscientiousness. The feeling is, "I have been paid for this work and I must do my best at it—earn my fee": and so the unpaid work is put aside or scamped. The story runs that Lord Mansfield, when he had to advise himself, used to transfer a guinea from one pocket to the other to maintain the illusion and give himself the requisite stimulus. It is, in truth, quite as much in the interests of *cestuisque* trust and beneficiaries as of the trustees and executors themselves, that trustees and executors should be properly remunerated; and our Colonies—whose position of detachment enables them to see old-fashioned doctrines of English equity in a truer perspective—would seem to be becoming sensible of the fact.

The tendency in these new countries is either to have a public trustee—a State official to deal with trusts and administrations or to constitute trustee and executor corporations—either under the general law or by special Act of Parliament, to deal with them. In either case the work is treated on a business footing, and is paid for either by a salary or percentage: see *infra* by way of illustration—the Western Australia Trustee and Executor Agency, Limited, constituted by a private Act of the Colony in 1893. But apart

from these, there is a growing body of legislation dealing with the remuneration of trustees and executors.

Some Colonial Legislation.—The following are some instances; they are not exhaustive:—

Queensland.

The Court may, by order, authorise a trustee to retain for his own use out of the income of the trust property a reasonable sum by way of commission for his pains and trouble in the management or sale of the property; but no such commission shall be allowed at a higher rate than £5 per cent. of income or proceeds. The provisions of this section extend and apply to the dealings of trustees with trust property since September 30th, 1886, unless the trustee and beneficiaries have in the meantime stated and settled their accounts, in which case commission shall not be allowed except in respect of the period which has elapsed since the settlement of such accounts (1897, 61 Vict., No 10, s. 55).

Ontario.

Any trustee under deed, settlement, or will, any executor or administrator, any guardian appointed by any Court, and any testamentary guardian, or any other trustee, howsoever the trust is created, shall be entitled to such fair and reasonable allowance for his care, pains, and trouble, and his time expended in and about the trust estate, as may be allowed by the High Court or judge, or by any master or referee thereof, to whom the matter may be referred (Revised Statutes of Ontario, 1887, c. 110, s. 38).

A judge of the High Court may, on application to him for the purpose, settle the amount of such compensation, although the trust estate is not before the Court in any action (R.S.O., 1887, c. 110, s. 39).

Compensation may be allowed in the case of any trust heretofore created, as well as in any to be hereafter created (R.S.O., 1887, c. 110, s. 40).

The judge of any Surrogate Court may allow to the executor or trustee or administrator acting under a will or letters of administration, a fair and reasonable allowance for his care, pains, and trouble, and his time expended in or about the executorship, trusteeship, or administration of the estate and effects vested in him under the will or letters of administration, and in administering, disposing of, and arranging and settling the same, and generally in arranging and settling the affairs of the estate, and may make an order or orders from time to time therefor, and the same shall be allowed to an executor, trustee, or administrator in passing his accounts (R.S.O., 1887, c. 110, s. 41).

Nothing in the next preceding four sections shall apply to any case in which the allowance is fixed by the instrument creating the trust (R.S.O., 1887, c. 110, s. 42).

British Columbia.

Any trustee under a deed, settlement, or will, any executor or administrator, any guardian appointed by any Court, and any testamentary guardian, or any other trustee, howsoever the trust is created, shall be entitled to such fair and reasonable allowance, not exceeding 5 per cent. on the gross value of the estate, by way of remuneration for his care, pains, and trouble, and his time expended in and about the trust estate, as may be allowed by the Supreme Court or a judge thereof, or by any master or referee thereof, to whom the matter may be referred, in addition to any other allowances for expenses actually incurred to which such trustee, executor, administrator, or guardian may by law be entitled (1897, c. 44, s. 2).

A judge of the Supreme Court may, on application to him for the purpose, settle the amount of such compensation, although the trust estate is not before the Court in any action (1897, c. 44, s. 3).

Such compensation may be allowed in the case of any trust heretofore created as well as in any to be hereafter created (1897, c. 44, s. 4).

A judge of the Supreme Court may allow to the executor, or trustee, or administrator acting under will or letters of administration, a fair and reasonable allowance, not exceeding 5 per cent. on the gross value of the estate, by way of remuneration for his care, pains, and trouble, and his time expended in or about the executorship, trusteeship, or administration of the estate and effects vested in him under any probate or letters of administration, and in administering, disposing of, and arranging and settling the same, and generally in arranging and settling the affairs of the estate, and may make an order or orders from time to time therefor, and the same shall be allowed to an executor, trustee, or administrator in passing his accounts, in addition to any other allowances for expenses actually incurred to which such trustee, executor, or administrator may by law be entitled (1897, c. 44, s. 5).

Nothing in the preceding four sections shall apply to any case in which the allowance is fixed by the instrument creating the trust (1897, c. 44, s. 6).

Cape Colony.

Executors are entitled to a reasonable compensation to be assessed by the master. A testator may himself designate the executor's total remuneration in lieu of fees and commission. Where this is not done, the master may allow commission of $2\frac{1}{2}$ per cent. on the whole estate.

Private persons are also by the law of the Colony permitted to carry on, and do carry on, the business of trustees for reward. They are as a rule attorneys or public accountants.

Jamaica is now contemplating legislation on the subject.

Western Australia.

The Western Australia Trustee and Executor Agency, Limited, incorporated by private Act in 1893, is authorised to be remunerated as follows:—

"The company shall be entitled to receive in addition to all moneys properly expended by it and chargeable against any estate placed under the administration or management of the company, a commission to be fixed from time to time by the directors of the company, but not to exceed in any case £2 10*s.* for every £100 of the capital value of any estate committed to the administration or management of the company as executor, administrator, receiver, committee, trustee in bankruptcy, or guardian."

The remuneration is to be paid out of the moneys committed to the management of the company, and to be accepted as a full recompense and remuneration to the company.

There are similar provisions in the constitution of the New Zealand Guardian, Trustee, and Executor Company, incorporated by private Act of the Colony in 1883.

NOTES.

Extension of the Society: Colonial Branches.—Readers of the Journal will be pleased to hear that the scheme for the formation of branches of the Society in all parts of the Empire has met with a cordial response from the Governments of the Colonies, and there is now every prospect of a complete system of regular correspondence for the interchange of legal ideas and information being established. Grants in aid of the Society have already been received from the Governments of Trinidad, of the Gold Coast, and of the Straits Settlement. The Governments of Bombay, of St. Lucia and of the Seychelles have also promised annual contributions. The following list represents replies received up to date; but as others are coming in from day to day, the list must not be looked on as at all complete.

Bermuda.—The Attorney-General is in communication with the Society.

Bombay.—The Chief Justice has agreed to act as President if the Government of India approve.

British Guiana.—The Attorney-General, Sir T. Rayner, is acting as local correspondent, and subscriptions to the amount of £18 have been received.

British Honduras.—The Attorney-General will act as local branch.

Ceylon.—A branch Committee has been formed including the Chief Justice and the Attorney-General.

Cyprus.—A branch is being formed by the Governor, Sir W. Haynes Smith, K.C.M.G., consisting of himself, the Chief Justice, a Puisne Judge, and the King's Advocate.

Egypt.—The proposal is under consideration of the Judicial Adviser to the Khedive.

Falkland Islands.—The Executive Council of the Colony will act as Local Committee.

Gambia.—A Branch Committee has been appointed consisting of the Colonial Secretary, the Chief Magistrate, the Attorney-General, and others.

Gibraltar.—The Attorney-General will act as local correspondent, and will furnish the Society with information on legal matters and copies of all enactments.

Gold Coast.—A local branch has been formed comprising the Chief Justice, the Attorney-General, and one Puisne Judge. An annual contribution of five guineas has been granted.

Jamaica.—A branch is being formed comprising the Colonial Secretary, the Chief Justice, the Attorney- and Solicitor-General, the Crown Solicitor,

and others. The Attorney-General expresses the view that the scheme will be most valuable.

Hong Kong.—A branch has been formed comprising the Chief Justice and the Attorney-General.

Lagos.—A branch has been formed here, with the Chief Justice as President.

Malta.—A branch has been formed, with the Chief Justice as Chairman and several Judges and Crown lawyers as members.

Mauritius.—A branch has been formed under the presidency of Mr. Justice Wood-Renton.

Natal.—A branch has been formed comprising the Chief Justice and the Attorney-General.

New Brunswick.—The matter is being laid before the Executive Council.

Newfoundland.—The Minister of Justice, recognising the value of the proposal, has, with the concurrence of the Governor, Sir Cavendish Boyle, undertaken to place himself in communication with the Society.

Northern Nigeria.—A local branch has been formed comprising the Chief Justice and the Attorney-General.

Nova Scotia.—The matter is receiving consideration.

Orange River Colony.—A branch is being formed consisting of the Chief Justice, the Attorney-General, and others.

Rhodesia.—A branch is in process of formation.

St. Lucia.—A branch consisting of the Chief Justice, the Attorney-General, the Treasurer, and others has been formed, and an annual contribution of £10 granted.

Seychelles.—A branch committee has been formed consisting of the Judge and the Legal Adviser, and an annual contribution of five guineas voted by the Legislative Council.

Sierra Leone.—The Attorney-General has agreed to act as local correspondent.

Southern Nigeria.—Copies of Laws and of Government gazettes are being sent.

Straits Settlement.—A branch has been formed. An annual contribution of five guineas has been granted by the Governor.

Tasmania.—The matter is under the consideration of the Attorney-General.

Trinidad.—An annual grant of £5 has been approved by the Government.

The Board of Trade and the Society of Comparative Legislation.—The Society of Comparative Legislation has received no more marked or valuable recognition than that recently accorded to it by the Board of Trade. That Department has of late done much and in many ways to assist merchants and manufacturers interested in foreign trade by procuring and publishing accurate and precise intelligence. Obviously of great importance to all such persons is timely information as to laws in any way affecting foreign trade and commerce. The accounts of colonial and foreign legislation, as well as various articles in this Journal, may, it is hoped, have been useful in this

respect; and the Commercial Intelligence Department of the Board of Trade, recognising that the Society may be of public service in collecting and publishing such information, has made a temporary grant in aid of its work. It is needless to say that the Department is not in any way, directly or indirectly, responsible for what appears in the Journal. It will be the endeavour of the Editors to devote attention to a branch of comparative legislation which is of supreme practical importance.

Mr. Haldane on a Court of Appeal for the Empire.—The subject of a Final Court of Appeal for the Empire was revived at a recent meeting of the British Empire League, and Mr. Haldane's speech on this occasion is so important and suggestive that we make no apology for printing it at length. The terms of the resolution were as follows:

> That the Council desire to express an earnest hope that fresh steps towards bringing the question of the establishment of an Imperial Court of Appeal under the consideration of the Australasian and Canadian Governments may be taken by His Majesty's Ministers.

In moving it, Mr. Haldane said: "Lord Avebury, the question to which this resolution relates, the resolution which I have been asked to move, is of interest to us on different grounds. In the first place it is extremely desirable that the interpretation of the great masses of Common Law and Code Law which are distributed throughout the Empire should be interpreted by the best minds the Empire can produce. On that depends in a large measure the security of our merchants that they can get sure justice and the sense which our people have that the law is developing towards a better interpretation. The Empire contains not one, but several, systems of Common Law. There is the great English Common Law system, and the great French Common Law which obtains in Lower Canada, Mauritius, and, with modifications, in other parts of the Empire. What is essential for the reduction of that Common Law to clear principles, and for the keeping of it up to a level which is worthy of the time in which we live, is that the best minds should be brought to bear upon it, and that is one value of a Court of Imperial Appeal. Another value of such a Court is in the interpretation of the great Common Constitution—the Constitution we call British and which is reproduced under the Crown in different parts of the King's dominions with the same common principles, the same elasticity and power of adapting itself to circumstances. There again, in the past, the Privy Council has played a great part in advancement and interpretation. To many, happily, the establishment of a Court of Imperial Appeal represents the development of a great link, a real link, in the holding of the Empire together, and a link which, like most, requires attention and renewal from time to time.

Anomalies of the Dual System.—"At the present time we have drifted into an unhappy situation. We have two supreme tribunals in the Empire—the House of Lords, which disposes of appeals from England, Scotland, and Ireland, and the Judicial Committee of the Privy Council,

which is charged with advising the King as to the judgments he should give, as the supreme fountain of justice for the rest of the Empire. The men who sit in the two tribunals are, in the main, the same. But the Imperial splendours of the House of Lords, the mass of important business it has to transact in this country, has exercised a somewhat damaging effect upon the position of the Judicial Committee. Chancellor after Chancellor has tried his best to keep that committee up to its duty, but it is obvious that while you have, out of a certain number of men, to man two Courts, and man them in a fashion which overlaps, you never can be sure that the Court which tends to receive the least attention will not go to the wall. I am afraid that has been unfortunately true in the past history of the Judicial Committee, and some of us feel that no reform of the supreme tribunals of the Empire will be satisfactory which does not merge two Courts which never should have been separated, but which are *de facto* as well as constitutionally separated, back again into one single great corporate body.

The Ideal Scheme.—"Now, my Lord Avebury, for this purpose various schemes have been put forward, but I think that what has emerged as the ideal scheme is a scheme which should give the supreme jurisdiction, the supreme function of advising the King, not to the House of Lords nor to the Privy Council, but to a Court which should be the Supreme Court of Appeal for the whole Empire, which should combine within itself all the legal talent of the House of Lords and the Privy Council, and also selected legal talent which might be brought from and be representative of more distant parts of the Empire. I should be sorry to see a hard and fast scheme under which different places should always, each of them, have a representative in such a tribunal—I think that would give rise to friction, jealousies, and deterioration in the quality of the tribunal; but I do think that it is possible for the King to select, as he selects here, the judges from among the best. I think it would be possible to select from the judicial strength of the Empire, no matter from what part, the men most fitted by their talents and history to take part in the deliberations of this great tribunal, and to my mind one of the most valuable adjuncts to such a tribunal would be an advisory council which should assist the Sovereign in his decisions about others matters of Imperial moment—an advisory Cabinet charged with advising the Sovereign on affairs in the truest sense Imperial. For my part, I hold that one of the most valuable functions of such a body would be that it could be trusted without fear or favour to advise the Sovereign in choosing the persons and judges who should be members of the great tribunal. When the Sovereign found a great judge—and there have been such in distant parts of the King's dominions—he might name such a man to sit with other great judges from other parts in the Supreme Tribunal of the Empire, there to administer justice in the Supreme Court of Appeal for the Empire as a whole. Such a tribunal would do the work now done by the House

Lords and the Judicial Committee of the Privy Council. It would sit as one body for great cases, and might divide itself into two divisions for minor cases, and it should be housed, not as the Judicial Committee is, up a back street in a dingy room shorn of all the splendours which should attend the deliberations of such a Court, but in the Palace of Westminster, in a chamber which would be worthy of the dignity of the Supreme Tribunal of the Empire. These seem to me to be the lines on which such a tribunal must be fashioned, and why is it we have met with a good deal of disappointment in seeing the progress and the development of such a tribunal retarded?

Illusory Obstacles.—"There have been several causes, and I think there has been a disposition to put blame where it should not be put—that is, upon the Colonies themselves. A conference was called not long ago, and we know what were the views of its members, because they have since been published. There are indications that no scheme, no plan, and no lead was given to it of any definite kind. It is true that the Lord Chancellor presided, or assisted in its deliberations, but for all we can see no guidance was given to the conference. Canada took exception, not for the first time, to plans which she supposed were about to be propounded. I have had a good deal to do with the sittings which have taken place over the relations of the Dominion and the Provinces in the Privy Council during the last fifteen or twenty years, and I am sure that the old objection which was in the mind of Canadian statesmen is nearly passed. That objection arose out of the effect of the internecine quarrels between the Dominion Government and the Provinces in regard to points connected with the British North America Act of 1867, and undoubtedly the Supreme Court managed to show a tendency to throw its weight in favour of the Dominion as against the Provinces. That produced a feeling among the Provincial Governments of Canada that they would rather that the final tribunal should be free from the element which would probably represent the Dominion point of view in Canada. But the Constitution of Canada is nearly worked out. The great quarrels which used to come before the Judicial Committee no longer come, at all events in an acute fashion, and for my part I do not believe that if this tribunal was established on a large enough scale that any difficulty would be made by Canada. Then take Australia. Mr. Justice Hodges gave his warm approval to a scheme on lines such as I have suggested, and, so far as I am capable of drawing an inference, I believe that the voice of New Zealand is in the same direction; and we have had one or two cases before the Judicial Committee recently which make it more than ever desirable that in dealing with these great questions raised by the Colonial Governments any tribunal which deals with them should be the strongest and highest which the Empire can produce. It cannot be forgotten—and yet it is forgotten—that, after all, the appeals which come to the Privy Council from the self-governing possessions of the Crown are appeals which come, as it were, by a sort of permission of the Colonial Governments. The Colonial Governments could abolish

them, but they do not want to. They prefer to have a great, impartial tribunal of this kind; but their attachment to the tribunal depends entirely upon the estimate they form of its strength and of the extent to which it occupies a foremost place in our minds as well as their own, and therefore if we want to preserve that attachment we must see to it that the tribunal is made as strong as possible. But as regards Australia, New Zealand, and Canada, as far as I have been able to gather from their representatives, I entertain no doubt that if the tribunal is made sufficiently great and powerful, it would be regarded with the same favour as of yore the Judicial Committee has been by those parts of the British dominions. The point of this resolution is to express a desire that the matter should be re-opened. I for my part think it has never been properly opened at all. Our rulers never have been in earnest; they have not grappled with it.

Formulating a Plan.—"It remains a great question to be taken up, fought out, and dealt with in a conference, in which a real plan should be submitted for the consideration of those representatives of the Colonies and of India who attend that conference. If the events of the last two years have shown anything, they have shown that no plan will commend itself unless it is thoroughly thought out and presented in a fashion which makes it intelligible. It is no use putting out haphazard one suggestion and following that up by another, as, for instance, that there shall be certain new members added to the Judicial Committee. The Colonies want a really strong tribunal, which will be strong in law, strong, for example, in the Constitutional Law of Canada, strong in the difficult questions of interpretation of Statutes which come from New Zealand and Australia, and in the interpretation of great questions of Common Law, be they English or Roman-Dutch, which come from the Cape or from various other parts of the Empire. Well, with a view to that, I feel that no step will be effectually taken which does not depend upon two things being done first. To begin with, the question must be earnestly thought out here, and in the second place it must be brought *de novo* in a full and complete form before the Colonial Governments concerned, and until that is done I have no hope of seeing any progress made. As the Colonies develop in importance and strength, the more they tend, as the Australian Commonwealth has done, to create their own Courts of Appeal, and the longer we delay this matter, the greater will be the danger that the opportunity which still exists will be gone for ever."

There is no desire on the part of the Colonies, Mr. Pember Reeves assures us, to break away from an Imperial tribunal at the centre of the Empire. The Colonies wait for and would welcome a well considered plan. All they ask is that such a Court of Final Appeal shall be one worthy of the Empire. Mr. F. H. M. Corbet, in his recent review of the laws of the Empire, quotes a pregnant saying of a jurist, "Servatur ubique jus Romanum non

ratione imperii, sed rationis imperio." It is equally true of the laws of the British Empire.

The International Association for Labour Legislation.—We have received a letter from Professor Bauer, of Basle, the indefatigable Secretary-General of the International Association for Labour Legislation, expressing a desire that "some link between the British Society of Comparative Legislation and our Association should be formed." It is certainly to be desired that the labours and objects of the Society should be better known and appreciated in this country than they are. The Association was founded by the friends of the legal protection of workmen by Factory Acts and similar measures. Sections or groups, some of them very strong, have been created in most of the chief countries. The only conspicuous omission is that of Great Britain, which has, so far, officially stood aloof. But this anomaly may, it is hoped, be removed; as the President remarked, "Nous esperons qu'il sera encore possible d'amener la mère-patrie de la protection des ouvriers dans le cercle de notre organisation." Created by the Association, but independent of it, is the Office International du Travail, with scientific objects, particularly the preparation and publication of a bulletin containing an account of all the new laws affecting labour, Parliamentary reports and discussions, and resolutions of Congresses relative to labour. Those who are acquainted with the bulletin edited by Professor Bauer will agree that the difficult work of preparing short memoirs of legislation, accurate and intelligible, has been carried out with remarkable skill. We have taken the liberty of reprinting from the pages of the bulletin a table showing synoptically the various regulations as to hours of labour. It is only a sample of the admirable work which the Office du Travail accomplishes. Together with the *Annuaire de la legislation du Travail*, published by the Belgian Government since 1897, the bulletin serves as a much needed map to an intricate, ever-growing mass of legislation.

Legislation by Public Hearing.—"There is a method of legislation," says Mr. A. L. Lowell, writing from Boston to Sir Courtenay Ilbert, "almost, I think, peculiar to this country, that I wish you might have considered and discussed, although it really lies outside the field of your book [*Legislative Methods and Forms*]: I mean legislation by public hearing. It corresponds more nearly to the cases in Parliament, where a Bill is referred to a select committee, than to anything else, except that the select committee hears only the witnesses that it thinks well to summon. In other words, it is an investigating committee: it holds an inquest; whereas the committees of the Legislature in America habitually advertise hearings; and, unless the number of persons who wish to address them are too numerous, they hear everyone who wants to speak. The hearing is *coram populo*. It is, in one sense, a very democratic arrangement, because the people at large have the chance to express their views directly to the Legislature. In another sense it is not at all democratic; that is, the people who express their views do not, as they do in an election, count alike. On the contrary, the

committee gives weight, as a rule, to people in proportion to their standing in the community and knowledge of the subject. I am leaving out, of course, the influence that a man may possess on account of his political connections. This method of proceeding is almost universal in the State Legislatures, and it is extremely common in Congress. It is particularly important, perhaps, in a State like Massachusetts, where the capital is in the principal city, so that it is easy for people to go up before the Legislature; and leading citizens who take an interest in public affairs—though not themselves in any sense in politics—will often appear before a number of different committees on different subjects during the session, and their views have great weight. These are not experts only, such as appear before select committees; they are prominent citizens in the community. I am inclined to think that this institution may have much effect in promoting good legislation and preventing bad, and obviating certain evils that are supposed to inhere in American legislation."

Bankruptcy Law in the United States.—Ten years ago the United States passed an Act embodying, for the first time, a national system of bankruptcy law. This year an amending Act has been passed, and it is instructive to note the points on which experience has dictated amendment. One is as to the discharge, as might be expected; for the discretionary and disciplinary power to grant or refuse, suspend or revoke, a discharge—to ostracise a debtor from commercial life—is that on which more than on anything else the efficient working of a bankruptcy system depends. Under the principal Act the debtor in the United States was entitled to his discharge unless he had committed an offence punishable by imprisonment under the Act, or destroyed his books of account, or failed to keep them, in order to conceal his financial condition. Now the exit is made much straighter and narrower for the debtor, and the Court, in weighing the question of discharge, may take cognisance of a number of other matters—whether the debtor has obtained credit on false statements, or made away with his property to hinder, delay, or defraud his creditors, or got a previous discharge in voluntary proceedings, or disobeyed orders of the Court, or refused to answer questions; in fact, the same tendency is manifested as in the English law on the subject to distinguish between misfortune and misconduct, and to visit the latter severely. Fraudulent preference is another matter on which the law in the United States has had to be made more explicit; and here it is observable that American law has skirted the quagmire of English bankruptcy law caused by the use of the words, "with a view of giving such creditor a preference," and has declared that the debtor is "to be deemed to have given a preference" if—to put it shortly—the effect of the transaction is to enable the creditor to get a greater percentage of his debt.

A Game License and the Onus of Proof.—Charles Lamb, speaking of the *plagosus Orbilius* of his youth, relates that "once and but once the uplifted rod

was known to fall ineffectually from his hand, when droll, squinting W——, having been caught putting the inside of the master's desk to a use for which the architect had clearly not designed it, to justify himself, with great simplicity averred that *he did not know that the thing had been forewarned.* This exquisite irrecognition of any law antecedent to the oral or declaratory struck so irresistibly upon the fancy of all who heard it—the pedagogue himself not excepted—that remission was unavoidable." The anecdote is recalled by a case in the Natal Law Reports, where one M—— was charged with shooting royal game—to wit, a Steen Bok—without obtaining the express permission of the Governor of Natal under certain laws of the Colony, and naively took exception to the charge on the ground that the prosecution had not proved the absence of permission. This whimsical inversion of the onus captivated the acting magistrate, like Lamb's schoolmaster, but, needless to say, it did not meet with the same favour in the Supreme Court.

Imperial Legislation for the Colonies.—Mr. Piggott's *Collection of Imperial Statues Applicable to the Colonies* is one of many signs of the growing interest in the relations of the Colonies and the mother country. To gauge the value of such a work let the English lawyer or the Colonial lawyer realise to himself what it is to search the Statutes at Large to find some section of an Imperial Statute dealing with a Colonial matter,—hunting the haystack for the traditional needle is a trifle to it. But the collection is much more than a "time-saving machine." It recalls much half-forgotten and obsolete legislation; it reveals many legislative omissions and anomalies; it illustrates how the legislation of the Empire has fluctuated with the ebb and flow of the Imperial spirit. To say that this Imperial Legislation for the Colonies is unscientific is to use a very mild term; but can such want of method be wondered at when we remember the number of different systems of law into which legislation has to be fitted, and the variety in the form and powers of the legislative bodies which often have to give effect to it? Many of these differences are inevitable—they have their roots deep in local conditions, but many of them are not; they are due to simple ignorance of what has been done and is being done in other parts of the Empire; and in dealing with these a book like Mr. Piggott's is one of the first conditions of improvement.

Mistakes in Telegraphic Messages.—Our Courts have arrived at the remarkable conclusion that a telegraph company owes no duty to the sender of the message; there is neither privity of contract nor obligation of care (*Dickson* v. *Reuter Telegraph Co.*, 3 C.P.D. 1). In America the tendency is the other way—to emphasise rather than minimise the liability of telegraph companies. A State Court (in *Western Union Telegraph Co.* v. *Flint River Lumber*, 88 Am. St. R. 36) has even gone so far as to rule that if a message is delivered to a telegraph company containing an offer to sell merchandise at a certain price, and the company so transmits it as to contain

an offer at a less price, the sender is bound to furnish the merchandise at the latter price, and he may recover from the company the damages sustained by complying with the offer. This is startling, and seems to err as much by excess as our law by defect. It may be inconvenient—no doubt it is—to the recipient of a message not to be able to rely implicitly on its correctness, but neither Marconigraph nor cablegram, telegram nor telephonic message possesses the quality of infallibility; the users know it, and they must take these benefits of science with their imperfections. The true remedy seems to lie not in any enlargement of agency, but in imposing on telegraph companies, as has been done generally in the United States, a statutory duty of diligence. Anyone injured by a company's carelessness can then sue it without being embarrassed by questions of contract. This statutory duty is justified in American opinion by the fact that telegraph companies exercise a quasi-public employment, and certainly the part which telegrams now play in our business and social life affords a very good reason for it.

The Enforcement of Administrative Law.—Professor Harrison Moore, writing from the University of Melbourne, says: "The importance of the English judicature in the British Constitution is a familiar theme with those writers on our Constitution who compare and contrast our institutions with those of foreign countries. Constitutional Law naturally emphasises this feature in relation to the power of the Courts to check and control executive action in the interest of individual liberty and private right. This is the significance of the struggle on the validity of proclamations, whether for dealing with national emergencies—the *summa potestas* of the sixteenth and seventeenth centuries—or for supplementing the general provisions of the law; the conflict between James I. and the Courts of Common Law; the writ of *habeas corpus* as availing against imprisonment by order of the executive; the denial to a great officer of the State, such as a Secretary of State, of the power to issue warrants for the apprehension of offenders or the seizure of property. But the importance of the Courts of law is not less conspicuous in Administrative Law—a department which is less directly concerned with individual liberty than with the efficient working of the machinery of government. Here we are struck with the feature whereby in the English system the judicial office is made a means of assisting administrative action or control, not merely by its primitive sanctions, but by its mandatory powers. Probably the most notable instance of recourse by the Executive to the power in recent years has been the increasing use of the injunction in the United States in what are really cases touching the public peace, safety, or convenience. During the great railway strike of 1894 there was much intimidation, destruction of property, and obstruction to traffic by the strikers and their sympathisers. The United States Government, as the guardians of the mails, applied to the Federal Circuit Court for an injunction against the officers of the Union directing the strike, and the injunction

issued. The defendant was attached for disobedience, and sued out his writ of *habeas corpus*; but the attachment was supported by the judgment of the Supreme Court.[1] The weapon is a very powerful one; it enables the Executive to act with far greater promptness and certainty than is at all possible in a criminal prosecution, especially in regard to what used to be called the 'inchoations or middle acts' of offence. There is no delay, no bail, no jury; prompt obedience must be rendered at once, upon pain of imprisonment for an indefinite time. It is hardly to be wondered that this action recalls another and less honoured administration of 'criminal equity' in our legal history, or that there is much agitation against the new 'Government by Injunction.'[2]

Initiation of Legislation by the Executive.—"This is not the only direction in which modern law is strengthening the action of the Executive. In his chapter on 'Parliament as a Legislative Machine' (*Legislative Methods and Forms*) Sir Courtenay Ilbert calls attention to the fact that the greater part of our Statute Law is substantially Administrative Law, and that the increase of legislation means the increase of public authorities and their functions. The system whereby the Executive Government has come to have practically the sole initiation of legislation has had very important consequences in relation both to the substance and the form of our Statutes. Acts of Parliament are no longer devised by a body distinct from and jealous of the Executive; they express in the main the views of the Executive itself as to the public needs. The tendencies of such a combination of functions are with us checked partly, of course, by the knowledge that Bills must not only be made, but must be made, to pass, partly by the dual character of the Minister himself, and not a little by the fact that with us the permanent public service is less than elsewhere an official caste, with traditions and sympathies distinct from those of the ordinary citizen. But still, certain tendencies may be marked. In the first place, the Executive has won the power of supplemental legislation. In every important Statute dealing with complex administrative affairs a power to make orders, rules, or regulations is almost a matter of course. The power is of course a delegate power, and therein it differs from the inherent power once claimed for the Crown, and to-day claimed and exercised by the Executive in France. It is readily given, since it is exercised by a Ministry which is responsible to the Parliament and to the country; and very commonly provision is made for bringing such orders to the notice of Parliament, and in a sense of inviting the opinion of Parliament upon them. The practice has the additional merit of improving the form of the Statute Book, and under the arrangements now made there is in the United Kingdom probably no sacrifice of

[1] *In re Debs* (1875), 158 U.S. 564.

[2] See the *Revival of Criminal Equity*, by Edwin S. Mack, 16 *Harvard Law Review* (1903), p. 389; *Government by Injunction*, by C. N. Gregory, 11 *Harvard Law Review* (1898), p. 487; and *The Modern Use of Injunctions*, by F. J. Stimson, 10 Pol. Sc. Q., p. 189.

'cognoscibility' (see the Rules Publication Act, 1863, and the Regulations made thereunder). It would be well if we could say the same in regard to the Colonies. In Australia at any rate, where the habit of delegating a power of supplementary legislation to the Governor in Council is at least as common as in England, the want of cognoscibility of such rules is a very great inconvenience and may be a very serious mischief.

"**Emergency**" **Legislation.**—"There is another feature of modern legislation touching public administration which deserves more notice than it has received. While the Courts are still the tribunals for the enforcement of administrative powers, there is a tendency to put such matters on a different footing from ordinary criminal prosecutions. There are not a few Statutes which require the Administration to do no more than make out a *primâ-facie* case; or they establish certain presumptions of law in its favour, and cast upon the defendant the burden of proving the contrary (for a list of English Statutes—not all 'administrative'—of this character, see Taylor on Evidence, s. 345 *et seq.*; the practice is common in the Australian Colonies). Such a practice is particularly associated with what contemporaries call 'emergency' legislation, and posterity often 'panic' legislation. One may mention the Explosive Substances Act, 1883, and 'Coercion Acts,' such as the Bill lately introduced into the Parliament of Victoria for the suppression of the Railway Strike, 1903. Customs and Excise Acts are perhaps those in which the Administration has been most freely granted drastic powers—powers of search and seizure, of holding property until payment of the demand, with an unusually extended immunity to officers for acts done. The enforcement of penalties used to belong to the Exchequer alone. When jurisdiction was committed to the magistrates, they were at first bound to impose the prescribed penalty, and it was not for some time that the amount of the penalty within the maximum was left to their discretion. The Australian Commonwealth Customs and Excise Acts, 1901, in some respects go further than the existing English Law. In many cases a minimum penalty of substantial amount is fixed, while the provision of the Customs Law Consolidation Act, 1876, ss. 259, 260, which throws upon the defendant the *onus probandi* in certain specific matters, is enlarged into a general provision that, save where fraud is charged or the offence is indictable or punishable directly by imprisonment, the averment by the prosecutor or plaintiff contained in the information, declaration, or claim shall be deemed to be proved in the absence of proof to the contrary (Customs Act, No. 6 of 1901, s. 255; Excise Act, No. 9 of 1901, s. 144). A case[1] recently determined by the Supreme Court of New South Wales is an interesting instance of the traditional attitude of British Courts in criminal cases, and a valuable illustration of the ambiguities of the terms *proof* and *burden of proof*, which, it may be remembered, is the subject of an important chapter in Professor Thayer's *Preliminary Treatise on Evidence at the*

[1] *In re Healey*, 1903, 3 N.S.W. State Reports, 14.

Common Law.[1] The defendant was charged before a magistrate with an offence under the Excise Act; and the magistrate, after hearing evidence for the defence, stated that he was not satisfied that the offence had been committed, but on the interpretation of the Statute he considered that it was for the defendant to satisfy him that the offence had not been committed, and he accordingly convicted. The Supreme Court held that to presume guilt and to throw upon the defendant the burden of establishing his innocence was such an inversion of the ordinary methods of administering justice that they could not believe the Legislature intended it. It was quite consistent with a common use of the term to treat *proof* as meaning *evidence*. The effect of the Statute, therefore, was that if the defendant offered no evidence, he must be convicted; but if he did produce evidence, then it was for the magistrate to decide on the whole of the materials before him whether he was satisfied that the defendant was guilty. Briefly, the burden on the defendant was to produce evidence: as Professor Thayer says, to go forward in evidence, not to establish a proposition; and the decision of the Court, which seems equally applicable to the whole of the class of Statutes that has been referred to, makes it clear that the burden of proof in the issue remains on the prosecution. The practical importance of the matter, as the case shows, lies in this, Which party has the benefit of the doubt? And the answer given is, The defendant. If, without establishing his own innocence, he has so far shaken the case for the prosecution as to leave the matter doubtful, he must be acquitted. The presumption of the innocence of the prisoner (which in some cases in America has been carried to great lengths) may or may not be a rule of law distinct from the doctrine which requires him who asserts the affirmative in an issue to establish it; but *In re Healey* shows at any rate that it is sufficient to turn the scale where a Statute makes it uncertain what is the issue and who has the affirmative and the negative respectively. It is interesting to notice that one member of the N.S.W. Court thought the Court was deferring to its traditions to such an extent as to defeat the intention of the Legislature. Pring J. says: 'I can't help feeling that the Federal Legislature did intend to do away with the principles and safeguards to which reference has been made, and that we have been somewhat led away by our desire to bring the law into accord with reason and justice.'"

The Bar Library and the American Statutes and Codes.—Readers of the Journal will be glad to know that a collection of the Statutes and Codes of all the American States, consisting of about seven hundred volumes, and complete to the year 1901, has recently been presented to this Library by a member of the Bar who is also a member of the American Bar, and arrangements are being made for the purpose of keeping up the continuations.

European Settlements in China.—The subject of European settlements

[1] See also the observations of Brett and Bowen, L.J.J. in *Abrath* v. *N.E.R. Co.*, 1883, 11 Q.B.D. 440.

in Eastern countries has long been studied, and lately in the pages of this Journal it was dealt with. In China have arisen the same problems relating to marriage, domicile, and succession as long ago arose in the Levant. But there is going on at Canton and other ports a novel development which has nowhere been so carefully examined as in Signor Enrico Catellani's volume entitled *I Settlements Europei.* According to the first form of the system, the British settlement was reserved exclusively for the British, the French for the French. Thus in Canton sites might be sold only to British subjects. But these national communities have in course of time become international. "I settlements municipali sono una nuova specie di autonomie municipali e non politiche di carattere federative. . . ." Signor Catellani gives a reference to some French decisions in which the question of the application of French Criminal Law to such settlements was considered. The *peregrinus* in the old Roman world brought about many changes in legal ideas and practices. The European stranger in the Far East is making also a veritable revolution. We look to the Japanese Association of International Law, founded at Tokio in 1897 (a copy of whose excellent review we have received), to keep the world informed of the future evolution of the remarkable movement which Signor Catellani describes.

Marks and Signatures.—We have received from the Colonial Secretary at Colombo reports of two interesting judgments decided by the Supreme Court of Ceylon: one deals with the question, "What is a mark as distinguished from a signature?" Suppose that the official language of the Court of a particular colony is English, and that this is held to mean (whether rightly or wrongly need not be considered) that no other language shall be used for any purpose—how is a signature in another language to be regarded? Is it a mere mark? In the case before the Supreme Court a Singhalese process server had written his signature in Singhalese characters. It was contended that this was no more than a mark which must be made, in order to be valid, in the presence of the Court, a Justice of the Peace, or a Commissioner. The Court over-ruled, as it seems to us, this point rightly and in accordance with the English decision, *Nathan* v. *Cohen*, 3 Dowling P.C., p. 370. As one of the Judges remarked, "A signature may always be translated if it is written in the characters of a foreign language; a mark cannot be translated." It is interesting to notice how all over the world the exact legal nature of the "rubber stamp" is giving rise to controversy.

Reports of International Arbitrations.—"It is evidence of the growing interest in international arbitration that a review has been established in Paris for the purpose of recording the proceedings in such arbitrations. It is entitled, *La Justice Internationale; Revue Mensuelle des Travaux et Decisions de la Cour Permanente d'Arbitrage et des Questions de Droit International,* and is edited by M. Gustave Hubbard. Its nature will be understood from a summary of the contents of the second number: Protocol of Feburary 13th, 1903, between Great Britain and Venezuela;

Award of M. T. M. C. Asser, in the arbitration between Russia and the United States, as to the ships *Cape Horn Pigeon*, *James Hamilton Lewiss*, —an award, by the way, which discusses the question, still very obscure, of the measure of damages in international disputes—"Les Obligations Juridique de la Grande-Bretagne envers les Porteurs de Titres des Chemins de Fer, Sud-Africains,"—a somewhat one-sided argument for the shareholders of the Netherlands South African Railway Company; An address by the Austrian group of the Inter-Parliamentary Union; A communication as to the petition of the holders of the Portuguese loan of 1838 to submit their claims to the arbitrament of the Hague Tribunal. Under the head of "Étude sur les Secrets d'États," there is an attack on secrecy in diplomacy. Not the least interesting contribution is a sketch, with a portrait, of M. d'Estournelles de Constant, one of the French members of the Hague Tribunal. We congratulate M. Hubbard on his useful enterprise, the success of which will not be less if, eschewing controversy as much as possible, it presents a faithful record of international arbitration. Every year is more and more felt the need of a periodical or set of reports which "recueillera tous les documents de jurisprudence et de procedure concernant les conflits internationaux et leurs règlements par la voie pacifique de manière à former une collection complète de jurisprudence internationale."

The Husband and the Milliner's Bill in Roman-Dutch Law.—We have received by the kindness of the Attorney-General—Sir T. Rayner—some interesting reports of cases decided in the Supreme Court of British Guiana —a part of the King's dominions where Roman-Dutch Law still holds sway. There, it appears, as here, the question of a husband's liability for his wife's bills for millinery, jewellery, and other superfluities of rational existence troubles at times domestic tranquillity. In England, to charge the husband, his authority must be proved: marriage by itself implies no necessary mandate. Roman-Dutch law looks at the question rather differently. The rule of law as laid down in Grotius 1, 5, 23, *Voet ad Pand*, XXIII. 2, 43, is that the husband, apart from express or implied consent to or ratification of his wife's contract, is liable (except in the case of his wife carrying on a trade publicly and in the case of the purchase of household necessaries) only when he has "profited" by his wife's dealings or become richer thereby. It is not enough for the tradesman to prove delivery of the goods to the husband: he must prove that the husband has been benefited or rendered richer. The difference is instructive, bringing into relief, as it does, the two views of wedlock, English and Roman-Dutch: in one the husband, "the head of the wife"; in the other, a partner in the matrimonial society. But "benefited" is an elastic term quite capable of adapting itself to the exigencies of modern life. Who can estimate the influence of the well-dressed woman in the society of to-day, or what it may do for an ambitious husband?

Newspaper Companies and Libel Actions.—The Colonial Law Reports are far too little known to English lawyers, seeing what valuable commentaries they furnish on English law. Here, for instance, is a case in the Supreme Court of New South Wales (*Hoe* v. *Lee*, 3 St. Reps. 30), raising the question whether a newspaper company with no express power to borrow in its memorandum of association can raise money on the security of its assets for the purpose of defending an action for libel brought against it. The court was of opinion that it could; that a newspaper company is a trading company in the larger sense, and has as such an implied power of borrowing to a reasonable amount for the purpose of its business, among the risks of which libel actions must in these days of enterprising journalism certainly be reckoned.

In the English case of *Breay* v. *Royal British Nurses Association* (1897, 2 Ch. 272, 66 L.J.Ch. 587), which was a case of a company defending a libel action against its servant out of its funds, it was laid down that a corporation can act in any ordinary matter of business in the same manner in which an individual conducting the same kind of business can act. But the company there was one incorporated by charter and a chartered company, as Lord Justice Bowen pointed out in *Baroness Wenlock* v. *River Dee Company* (36 Ch.D. 685) is in a very different position from a company under the Companies Acts. The chartered company may do everything it is not expressly prohibited from doing; the Statutory Company only what it is expressly or implicitly authorised to do by its "objects clause" and the provisions of the Companies Acts.

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